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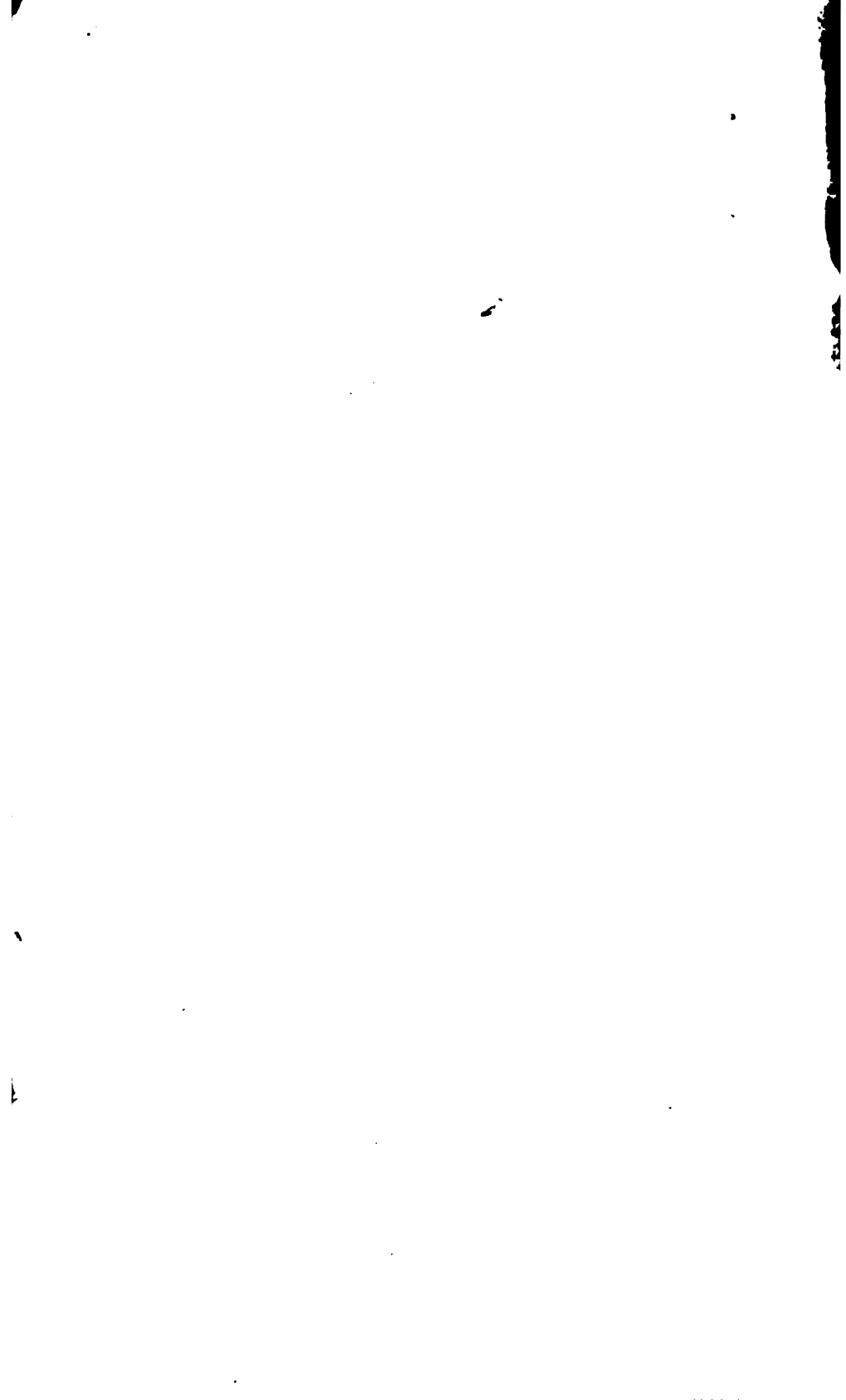
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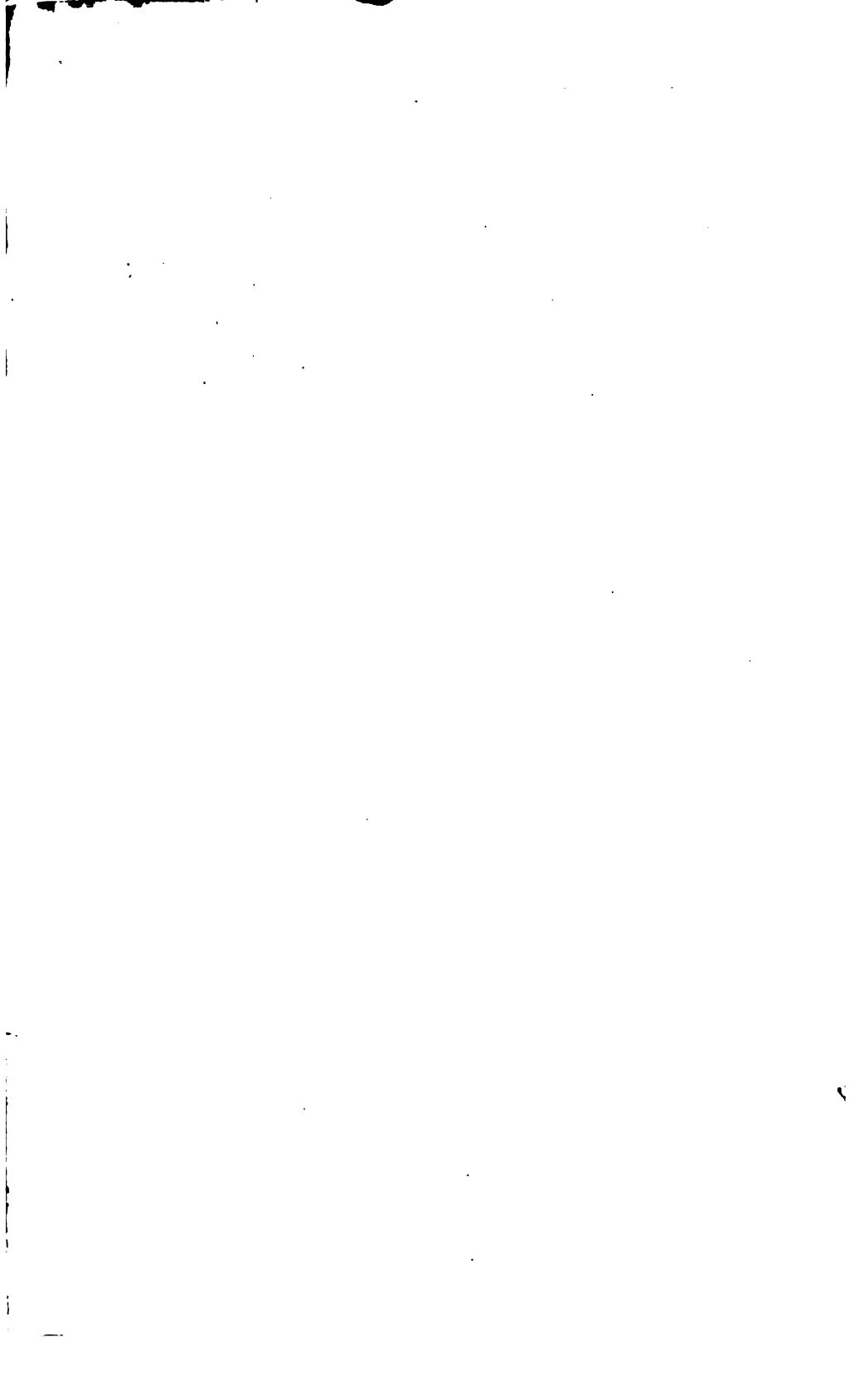
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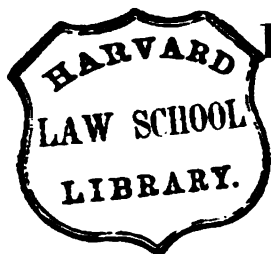
VOL. 24—TENNESSEE REPORTS. (5 HUMPHREYS.)

5hu 9	5hu 50	5hu129	5hu290	5hu339	5hu381	5hu443	5hu530	5hu612
3co373	7hu 42	1s 130	3m 170	6m289	1h 222	1s 503	3co484	11hu284
4co180	4co 62	3he441	6L 279	6hu391	10h 342	11hu454	4m643	1he119
6co644	7co573	5h 357	6L 682	9hu545			5hu529	1co 22
2h 116		3pi209	3pi177	11hu211	5hu388	2he646	6hu310	2h 417
8L 636	5hu 53		4pi579	1s 10	7hu501	1co 99	7m 90	5h 505
	2co392	5hu134		1s 306			2s 42	2L 165
5hu 13		7hu460	5hu294	4h 126		5hu446	4co357	2L 374
7b 10	5hu 56	11hu522	2s 190	4h 695	5hu386	4co292	3h 606	6L 178
	3m661	2co360	4b 52	14L 114	7L 690	1h 709	9h 89	9L 660
5hu 15	11hu 47	8b 165	7h 309	16L 237	7L 692	15L 576	12h 188	
6hu306		7h 161	7h 310	16L 239				5hu619
1he944	5hu 57	3L 573			5hu387			9hu730
1co 34	11hu 16	10L 128	5hu399	5hu335	1b 280	5hu453	5hu559	11hu137
1co 35	4m395	10L 133	3L 290	3he331	6L 182	4b 212	3h 226	2m251
3co476		5hu138	5hu304	5hu337		3h 628	5hu559	2co618
4co296	5hu 59	5L 284	12h 470	1s 509	5hu389	3h 629	4h 596	3co459
7co414	6co509		6L 54	2co506	6co429	4h 18		5L 704
1h 317		5hu140	12L 605	4h 39	4h 333	4h 23	5hu561	5hu629
2h 453	5hu 62	6hu306	5hu310	1L 572	5hu392	4h 24	5m254	9b 156
9h 694	11hu292	4co293	2s 201	5hu343	2co137	7h 248	5m439	1L 155
10h 94	2h 172	1b 229	1he493	5hu498	8h 844	1L 172		1L 180
10h 358	10h 205	1h 317	4h 374	12h 194	1L 568	9L 213	5hu562	
4L 421	1L 149	1h 387	9h 742	3pi538	7L 718	10L 377	1he519	
5L 90		5L 99						
	5hu 66					5hu476		
5hu 19	9hu522	5hu145	5hu312	5hu345	6co348	5hu567		
10hu444	2he342	3co349	1he224	7b 492	7h 608	5hu600		
	1h 589		5hu319	11h 511	6L 212	2b 41		
	3h 532		1he242	5hu347	11L 462	1t 194		
5hu 26	10L 342	5hu154	1he242	6hu83		5hu480		
6hu535		11hu219	3he310	1s 312	5hu397	5hu498		
9hu522		4m146	3co 63	3he174	14L 198	1co303	5hu573	
1s 205	5hu 68		6L 95	1m375	14L 201	2he538	5L 639	
1s 206	3h 226	5hu155				5hu485		
4m410	10L 500	3co342	5hu313	5hu349		4co264		
2co219			2he163	1m191	5hu400	1b 220	5hu578	
5co295	5hu 70	5hu161	2he571	5hu352	2s 578	1h 317	4b 45	
1h 589	2he211	3L 573	1b 442	8hu557		1h 388		
5h 460	4L 120		1h 420	11hu280	5hu404	1h 719	5hu581	
6L 683		5hu166	7h 246	5m413	3he 17	6h 105	6hu283	
11L 680	5hu 79	8h 272	9h 738	5co387	7b 401	5L 97		
14L 350	1L 173			6h 542	4h 374			
						5hu489	5h1580	
5hu 38	5hu 91	5hu170	5hu315	4m379	5hu407	2he132	5hu681	
1he 33	4h 582	10hu260	2he258	5hu357	7hu 36		1m286	
1co626		1s 361	2he302	10hu244	1co183	5hu492	6h 328	
5b 111	5hu 94	2co 80	2he571	10hu296	2co424	4co615		
5L 582	3h 109	2co 81	3co519	9h 344		1b 467	5hu585	
6L 732		6b 236	7co291	4L 90	5hu411	1L 458	2m484	
	5hu 96	7h 694	7co293		1he200	4pi 23	5hu593	
5hu 40	10L 669	5L 324	1h 420	5hu361	2L 646		3he502	
6hu306		5L 646	2L 226	11hu346		5hu496	4co470	
4co293	5hu100	13L 30	7L 605		5hu417	5h 710	2h 513	
1h 317	1m129	3pi608	5hu290	5hu365	1he310	11h 491	10h 341	
5L 96		4pi638	10hu449	5m471	3he544			
			1b 156	2h 365	1co 70	5hu502	5hu599	
5hu 44	5hu105	5hu241	1b 261	5hu370	10L 323	6L 212	1t 194	
2s 179	4co624	7hu154	3L 677	7b 492		7L 672		
1he559		1s 53			5hu425		5hu601	
5h 393	5hu108	1m357	5hu322		1he440	5hu505	7b 484	
	2co373	3he 77	2he537	5hu373	1h 732	5h 230		
5hu 47	3co172	4co101	5h 827	7co537	5h 692	5h 236	5hu605	
2he390	1h 93	8b 436	5hu329		5h 693	12h 407	1s 418	
7L 211		2L 433	2pi675	5hu379		1pi646	4co471	
	5hu111	3L 677		3he503	5hu428	2pi277	6b 227	
5hu 49	5L 105	14L 580	5hu331	1b 297	2m566		1h 701	
2he 84		3pi214	1pi297	2h 513	5hu519		10h 376	
2he 85	5hu115			6h 532	3h 279			
3co 62	1L 580			10h 341				
				9L 177				

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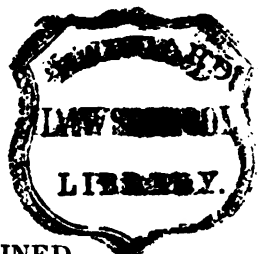






REPORTS

OF



CASES ARGUED AND DETERMINED

4738

IN THE

SUPREME COURT OF TENNESSEE,

DURING THE YEAR

1844-5.



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BY WEST H. HUMPHREYS,  
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INDEX OF CASES.

A		Bryan <i>et als.</i> Hunter <i>vs.</i>	47
Agee, Hunter <i>et al. vs.</i>	57	Bryan <i>vs.</i> Martin,	565
Alderson, Phillips <i>vs.</i>	403	Burt <i>vs.</i> Davidson,	425
Allen <i>et als.</i> Green <i>et als.</i> <i>vs.</i>	170	C	
Allen <i>et als.</i> <i>vs.</i> Morgan <i>et als.</i>	624	Campbell <i>et al.</i> White <i>vs.</i>	38
Allison <i>vs.</i> Tyson,	449	Carmichael <i>vs.</i> Carmichael	96
Anderson, Gift <i>vs.</i>	577	Caplinger <i>vs.</i> Vaden,	629
Armstrong <i>et als.</i> , Webb <i>vs.</i>	379	Carpenter <i>vs.</i> Kee <i>et al.</i>	585
Ashley, Vincent <i>vs.</i>	593	Carr <i>vs.</i> Stevenson,	559
B		Carroway <i>vs.</i> State,	523
Bailey <i>et al. vs.</i> Cooper,	400	Caruthers, McGuire <i>vs.</i>	414
Baker <i>et als.</i> , Rollman <i>vs.</i>	405	Chaffin, Bracken <i>vs.</i>	575
Baker <i>vs.</i> Jordan,	485	Chambers <i>et als.</i> Thacker <i>vs.</i>	313
Bank of Tennessee, Han-		Charlton <i>vs.</i> Lay,	496
sard <i>et als. vs.</i>	53	Chairman County Court,	
Barker <i>vs.</i> Wheelip,	329	Hardaway <i>vs.</i>	557
Barksdale, State <i>vs.</i>	154	Chester <i>et al. vs.</i> Greer <i>et al.</i>	26
Barnard <i>vs.</i> Young,	100	Chouning & Payne <i>vs.</i> Sim-	
Bearden <i>et al.</i> Crippen <i>vs.</i>	129	mons,	299
Bedford <i>vs.</i> State,	552	Clayton, Davis <i>et als.</i> <i>vs.</i>	446
Bennet <i>vs.</i> Union Bank,	612	Clemmons, Howard <i>vs.</i>	368
Bellew <i>vs.</i> State,	567	Coleman <i>vs.</i> Sanderlin,	562
Benthal, <i>vs.</i> State,	519	Crook <i>et als.</i> Nolen <i>vs.</i>	312
Benton <i>vs.</i> Pope <i>et als.</i>	392	Cooper, Bailey <i>et al. vs.</i>	400
Bill <i>vs.</i> State,	155	Cowen, Britain <i>vs.</i>	315
Blake <i>vs.</i> Dunn <i>et al.</i>	578	Crippen <i>vs.</i> Bearden <i>et al.</i>	129
Blanton, McGuire <i>vs.</i>	361	Crosswhite, Smith <i>vs.</i>	59
Bond <i>et als. vs.</i> Ray <i>et als.</i>	492	Crouch <i>vs.</i> Miller,	586
Booker <i>vs.</i> Booker,	505	Crutchfield <i>vs.</i> Robins <i>et al.</i>	15
Boyd <i>vs.</i> Dodson,	37	Curtis, State <i>vs.</i>	601
Boyd <i>et als. vs.</i> Baynham,	386	D	
Bracken <i>vs.</i> Chaffin,	575	Dance <i>vs.</i> McGregor,	428
Bradley, <i>vs.</i> Graham <i>et als.</i>	476	Darter <i>et al.</i> Hale <i>vs.</i>	79
Bridges, Farrar <i>vs.</i>	411	Davidson, Burt <i>vs.</i>	425
Bright <i>vs.</i> State,	599	Davis <i>et als. vs.</i> Clayton,	446
Britain <i>vs.</i> Cowen,	315	Davis, Medley <i>vs.</i>	387

Davis <i>et al.</i> vs. Williams,	42	Hardaway vs. Chairman	
Davis' <i>ex'rs.</i> vs. Roberts,	111	County Court,	557
Dodson, Boyd vs.	37	Harris, White vs.	421
Dunn <i>et al.</i> Blake vs.	578	Harwell <i>et als.</i> , Taylor vs.	331
E		Haynes vs. State,	120
Eaton, Union Bank vs.	499	Haynic <i>et als.</i> vs. Hall <i>et als.</i>	290
Edmonds vs. State,	94	Heffly vs. Hall,	581
Evans, Smith vs.	70	Helm vs. Rodgers,	105
F		Helm vs. Franklin,	404
Faris, Trigg vs.	343	Henson, Sweat <i>et als.</i> vs.	49
Farquhar vs. Toney,	502	Herron vs. Marshall,	443
Farrar vs. Bridges,	411	Hodges, Noe vs.	103
Fleming vs. State,	564	Hodges vs. State,	112
Fountain, Hopson vs.	140	Holcomb, Union Bank vs.	583
Franklin, Helm vs.	404	Hopson vs. Fountain,	140
G		Howard vs. Clemmons,	368
Galbrath vs. Martin <i>et al.</i>	50	Huff, Wallen vs.	91
Gift vs. Anderson,	577	Hughlett vs. Hughlett <i>et als.</i>	453
Gillet <i>et al.</i> vs. Roadman,	44	Hunter vs. Bryan <i>et als.</i>	47
Gilman vs. Kibler,	19	Hunter <i>et al.</i> vs. Agee,	57
Glass, Mewborn vs.	520	Hunter <i>et al.</i> Taylor vs.	569
Gookin vs. Graham,	480	Hunter, State vs.	597
Governor vs. Organ	161	Hurrell vs. State,	68
Governor vs. Porter,	165	Hutchison vs. State,	142
Governor vs. McEwen,	241	I	
Graham vs. State,	40	Irvine's <i>heirs</i> vs. McRec,	554
Graham <i>et als.</i> vs. Bradley	476	J	
Graham, Gookin vs.	480	Jarrell vs. White,	306
Graham <i>et als.</i> vs. Lambert		Jim vs. State,	145
<i>et als.</i>	595	Johnson, Wade <i>et ux.</i> vs.	117
Graham vs. Nelson,	605	Johnson, Norvell vs.	489
Grainger <i>et als.</i> Turner vs.	347	Jones, Planters' Bank vs.	619
Green <i>et als.</i> vs. Allen <i>et als.</i>	170	Jordan, Marable vs.	417
Greenway <i>et al.</i> Greer <i>et al.</i> vs.	26	Jordan, Baker vs.	485
Greer <i>et al.</i> Chester <i>et al.</i> vs.	26	K	
Greer <i>et al.</i> vs. Greenway <i>et al.</i>	26	Kee <i>et al.</i> Carpenter vs.	585
Greer vs. Perkins	588	Kennedy vs. Wiggins,	125
H		Kibler, Gilman vs.	19
Hale vs. Darter <i>et al.</i>	79	Kinchelow vs. State,	9
Hall vs. Hawkins.	357	Knox vs. Thomas,	573
Hall, Heffly vs.	581	L	
Hand vs. State,	515-18	Lamden vs. State,	83
Hansard <i>et als.</i> vs. Bank of		Lambert <i>et als.</i> Graham <i>et</i>	
Tennessee,	53	<i>als.</i> vs.	595
Hansard vs. State,	115	Langford, Wilson <i>et als.</i> vs.	320
Harris, Saunders vs.	345	Langtree, Pillow vs.	389

Lay, Chariton <i>vs.</i>	496	Pillow <i>vs.</i> Langtree,	389
M		Planters' Bank <i>vs.</i> Union	
Marable <i>vs.</i> Jordan,	417	Bank,	304
Marshall, Herron <i>vs.</i>	443	Planters' Bank, Ross <i>vs.</i>	335
Martin <i>vs.</i> Ramsey,	349	Planters' Bank <i>vs.</i> White,	441
Martin, Bryan <i>vs.</i>	565	Planters' Bank <i>vs.</i> Jones,	619
Martin <i>et al.</i> Galbrath <i>vs.</i>	50	Pollard <i>vs.</i> Thomason,	56
May <i>vs.</i> Mitchell,	365	Pope <i>et als.</i> Benton <i>vs.</i>	392
Mayberry <i>vs.</i> Neely <i>et als.</i>	337	Porter, Governor <i>vs.</i>	165
McGhee, Morgan <i>vs.</i>	13	Porter, Miller <i>vs.</i>	294
McEwen, Governor <i>vs.</i>	241	Pulse <i>vs.</i> State.	108
McCutchen, Patterson <i>vs.</i>	322	Puryear <i>vs.</i> Thompson,	397
McLean, Stevenson <i>vs.</i>	332	Q	
McGuire <i>vs.</i> Blanton,	361	Quarles <i>vs.</i> State,	561
McNairy, Stump <i>et als. vs.</i>	363	R	
McGuire <i>vs.</i> Caruthers,	414	Ramsey, Martin <i>vs.</i>	349
McGregor, Dance <i>vs.</i>	428	Ray <i>et als.</i> , Bond <i>et als. vs.</i>	492
McRee, Irvine's heirs <i>vs.</i>	554	Read, Trigg <i>vs.</i>	529
Medley <i>vs.</i> Davis,	387	Richmond <i>vs.</i> Wagnon,	571
Mewborn <i>vs.</i> Glass,	520	Roadman, Gillet <i>et al. vs.</i>	44
Miller <i>vs.</i> Porter,	294	Roberts, Davis' ex'rs. <i>vs.</i>	111
Miller, Crouch <i>vs.</i>	586	Robins <i>et al.</i> Crutchfield <i>vs.</i>	15
Mills <i>vs.</i> Stewart,	308	Rodgers, Helm <i>vs.</i>	105
Morgan <i>vs.</i> McGhee,	13	Rollman <i>vs.</i> Baker <i>et als.</i>	405
Morgan <i>et als.</i> Allen <i>et als. vs.</i>	624	Ross <i>vs.</i> Planters' Bank,	335
Mosier <i>vs.</i> Zimmerman,	62	S	
N		Sanderlin, Coleman <i>vs.</i>	562
Neely <i>et als.</i> , Mayberry <i>vs.</i>	337	Saunders <i>vs.</i> Harris,	345
Nelson, Graham <i>vs.</i>	605	Searcy, Tilman <i>vs.</i>	487
Noe <i>vs.</i> Hodges,	103	Simmons, Chouning &	
Nolen <i>vs.</i> Crook <i>et als.</i>	312	Payne <i>vs.</i>	299
Norment's adm'r. <i>vs.</i> Wil-		Simpson <i>vs.</i> Turney,	419
son <i>et als.</i>	310	Sims <i>et als. vs.</i> Sims <i>et als.</i>	370
Norton <i>vs.</i> Whitesides,	381	Smith <i>vs.</i> White,	46
Norvell <i>vs.</i> Johnson,	489	Smith <i>vs.</i> Crosswhite,	59
O		Smith <i>vs.</i> Evans,	70
Organ, Governor <i>vs.</i>	161	Smith <i>vs.</i> State	163
Orr <i>vs.</i> Williams,	423	State, Kinchelow <i>vs.</i>	9
Owen's adm'r. <i>vs.</i> Owen,	352	State, Graham <i>vs.</i>	40
P		State <i>vs.</i> Woodson,	55
Patterson <i>vs.</i> McCutchen,	322	State, Hurell <i>vs.</i>	68
Perkins, Greer <i>vs.</i>	588	State, Lamden <i>vs.</i>	83
Perry <i>vs.</i> Patterson,	133	State, Edmonds <i>vs.</i>	94
Perry <i>vs.</i> Wooton,	524	State, Pulse <i>vs.</i>	108
Peter <i>vs.</i> State,	436	State, Hodges <i>vs.</i>	112
Phillips <i>vs.</i> Alderson,	403	State, Hansard <i>vs.</i>	115

State, Haynes <i>vs.</i>	120	Trigg <i>vs.</i> Read,	529
State, Thompson <i>vs.</i>	138	Turner <i>vs.</i> Grainger <i>et als.</i>	347
State, Hutchison <i>vs.</i>	142	Turney <i>vs.</i> State Bank,	407
State, Jim <i>vs.</i>	145	Turney, Simpson <i>vs.</i>	419
State <i>vs.</i> Barksdale,	154	Tyler <i>vs.</i> State,	383
State, Bill <i>vs.</i>	155	Tyson, Allison <i>vs.</i>	449
State, Tyler <i>vs.</i>	383	U	
State <i>vs.</i> Smith,	394	Union Bank, Planters'	
State, Peter <i>vs.</i>	436	Bank <i>vs.</i>	304
State, Hand <i>vs.</i>	515-18	Union Bank <i>vs.</i> Holcomb,	583
State <i>vs.</i> Benthall,	519	Union Bank <i>vs.</i> Eaton,	499
State, Carroway <i>vs.</i>	523	Union Bank, Bennet <i>vs.</i>	612
State, Bedford <i>vs.</i>	552	W	
State, Quarles <i>vs.</i>	561	Vincent <i>vs.</i> Ashley,	593
State, Fleming <i>vs.</i>	564	Vaden, Caplinger <i>vs.</i>	629
State, Bellevu <i>vs.</i>	567	W	
State Bank, Turney <i>vs.</i>	407	Wade <i>et ux.</i> <i>vs.</i> Johnson,	117
State <i>vs.</i> Hunter,	597	Wagnon, Richmond <i>vs.</i>	571
State, Bright <i>vs.</i>	599	Wallen <i>vs.</i> Huff,	91
State <i>vs.</i> Curtis,	601	Webb <i>vs.</i> Armstrong <i>et als.</i>	379
Stevenson <i>vs.</i> McLean,	332	Wheelip, Barker <i>vs.</i>	329
Stevenson, Carr <i>vs.</i>	559	White <i>vs.</i> Campbell <i>et al.</i>	38
Stewart, Mills <i>vs.</i>	308	White, Smith <i>vs.</i>	46
Stump <i>et als.</i> <i>vs.</i> McNairy,	363	White, Jarrell <i>vs.</i>	306
Swanson <i>vs.</i> White <i>et als.</i>	373	White <i>et als.</i> , Swanson <i>vs.</i>	873
Sweat <i>et als.</i> <i>vs.</i> Henson,	49	White <i>vs.</i> Harris,	421
Sword <i>vs.</i> State,	102	White, Planters' Bank <i>vs.</i>	441
T		Whitesides, Norton <i>vs.</i>	381
Taylor <i>et als.</i> <i>vs.</i> Whitthorn,	340	Whitthorn, Taylor <i>et als.</i> <i>vs.</i>	340
Taylor <i>vs.</i> Harwell <i>et als.</i>	331	Wiggins, Kennedy <i>vs.</i>	125
Taylor <i>vs.</i> Taylor <i>et als.</i>	110	Williams, Davis <i>et al.</i> <i>vs.</i>	42
Taylor <i>vs.</i> Hunter <i>et al.</i>	569	Williams <i>et al.</i> <i>vs.</i> Tipton <i>et al.</i>	66
Thacker <i>vs.</i> Chambers <i>et als.</i>	313	Williams, Orr <i>vs.</i>	423
Thomas, Knox <i>vs.</i>	573	Wilson <i>et als.</i> Norment's	
Thomason, Pollard <i>vs.</i>	56	adm'r. <i>vs.</i>	310
Thompson, Puryear <i>vs.</i>	397	Wilson <i>et als.</i> <i>vs.</i> Langford,	320
Thompson <i>vs.</i> State,	138	Woodson, State <i>vs.</i>	55
Tilman <i>vs.</i> Searcy,	487	Wooton, Perry <i>vs.</i>	524
Tipton <i>et al.</i> Williams <i>et al.</i> <i>vs.</i>	66	Y	
Toney, Farquhar <i>vs.</i>	502	Young, Barnard <i>vs.</i>	100
Trigg <i>vs.</i> Faris,	343	Z	
		Zimmerman, Mosier <i>vs.</i>	62

HON. NATHAN GREEN, }
" WILLIAM B. REESE, } *Judges of the*
" WILLIAM B. TURLEY, } *Supreme Court.*
WEST H. HUMPHREYS, *Attorney General.*



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE.

~~~~~  
KNOXVILLE: SEPTEMBER TERM, 1844.  
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KINCHELOW *vs.* THE STATE.

1. Evidence of a distinct substantive offence shall not be admitted in support of another offence: *a fortiori* shall not evidence of an intention to commit another offence be received. *Peck vs. The State*, 2 Hum. 86; 4 Hum. *State vs. Stone*.
2. An accomplice who testified to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by defendant, though made at the same time and in the same conversation.
3. The credibility of a witness is a question of fact to be decided by a jury; not by the number who may testify for or against his credibility, but by their respectability, intelligence, consistency and means of information. *Norris vs. State*, 3 Hum. 335.

Kinchelow was indicted in the Circuit Court of Washington county, for stealing a bag of flour. At the March term, 1844, Luckey being the presiding Judge, a jury was empaneled to try the case. The attorney for the State introduced Pursell as a witness. Pursell was brought from jail, being confined on a charge of larceny. The Attorney General informed the witness that no steps would be taken against him for his participation in the acts he was about to relate. The witness stated that defendant found him the night the larceny was committed, at the house of one Louisa Lane; that he left there with defendant; that they went to a field where there was a bag of flour; that defendant told him he had hooked it out of Swinney's mill; that he took the flour off to his kitchen; that when going on, they had

[Kinchelow vs. The State.]

much conversation; that defendant told him if ever he mouthed it he would kill him; that defendant then proposed to him to join him in various schemes of forgery, larceny, kidnapping, &c. &c. This proof was objected to by the counsel for the defendant, but the objection was overruled, and the testimony heard by the jury. The witness said he was in jail for stealing a collar; was prosecuted by Blair, the prosecutor of defendant; that Blair had agreed to drop the prosecution against him if he would disclose the truth on Kinchelow. He stated much more, which need not be here set forth. Witnesses were introduced, who testified in favor of his credibility and against it.

Some testimony was introduced, going to show that defendant was trying to get some flour the day before the larceny in question, and failed.

The Judge charged the jury, that "a conviction upon the unsupported testimony of an accomplice, would be legal; but as a general rule, the jury would be unwilling, and in point of fact would rarely convict upon the evidence of an accomplice, unless he was supported by other uncorrupted testimony." The court also charged the jury, that "when the testimony of a witness was impeached by assailing his general character, and an equal or greater number of witnesses sustained his general character, with equal or greater opportunities of knowing, he stood before the jury as if he had not been impeached."

The jury returned a verdict of guilty, and fixed his imprisonment at four years.

A motion for a new trial was made, overruled, and judgment rendered against the defendant, from which he appealed.

R. J. McKinney, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

The prisoner was convicted of the offence of larceny in the Circuit Court of Washington; and a motion for a new trial having been overruled, he prosecuted an appeal in the nature of a

[Kinchelow vs. The State.]

writ of error to this court. It appears, from the bill of exceptions, that the prisoner was convicted upon the testimony of one William Pursell, an accomplice in the commission of the crime. Upon his examination, after having deposed to the guilt of the prisoner, which he established by direct and positive proof, he was permitted to state that the prisoner proposed to him to join with himself and some other individual and go to Thompson's mill and steal corn, also to Martin Boyles's, disguised, to procure his intoxication by means of whisky and laudanum, and then steal his money. Witness was also permitted to prove that prisoner in the same conversation said to him, that he would forge notes on dead men's estates, and that he would give whisky and laudanum to one Sarah Ross, a white woman who had a mulatto child, and take the child and sell it as a slave. This proof was all of it objected to by the prisoner; but the objection was overruled by the Circuit Judge, upon the ground that the propositions and statements were made by the prisoner in the same conversation he had with the witness while he was committing the offence for which he is convicted. The bill of exceptions also shows that witnesses were examined as to the general character of William Pursell, for and against; and that the Judge charged the jury, "that when the testimony of a witness was impeached, by assailing his general character, and an equal or greater number of witnesses sustained his general character, with an equal or greater opportunities of knowing it, he stood before the jury as if he had not been impeached." Now how does this case stand upon this statement of facts? The prisoner is convicted upon the unsupported testimony of an avowed accomplice, one who from his own admission was under indictment for stealing a horse collar, accused of stealing an axe, which he admits was found in his house, a witness whose general character was assailed by proof in the progress of the cause, and who in addition thereto was informed by the prosecutor in the present case, that if he would tell on Kinchelow, the prisoner, the prosecution against him should be stopped; that he would befriend him if he could; that he would not bring witnesses against him, and that no bill of indictment should be found against him. The Attorney General, upon the trial,

[Kinchelov vs. The State.]

in substance, told him the same thing. Then here is a witness of established bad character, a thief by his own admission, in danger of punishment under the law, with the promises of pardon and freedom sounding in his ears as a reward for swearing against the prisoner, his general character assailed, brought forward to support an indictment, and there is no proof but his upon which it can be sustained. Standing in such a position, it was felt both by the court and prosecuting counsel, that a conviction was not to be expected, without some circumstances in support of his veracity; and for this purpose, the prisoner's statements as to other contemplated crimes made in conversation with the witness while perpetrating the felony for which he was on trial, were permitted to be received. This we think was all wrong. It was the misfortune of the witness and the State, that his testimony should need corroboration; but surely no legal principle should have been violated in order to procure it. It is well settled, that no proof of the admission of one distinct substantive offence shall be received upon a trial for the commission of another; *a fortiori* shall not statements of an intention to commit it. The only tendency of such testimony necessarily is to prejudice the minds of a jury, as it can by no possibility establish or elucidate the crime charged. We can well see how a jury who in the case under consideration might have unhesitatingly refused to find a verdict against the prisoner upon the evidence of the witness confined within its legitimate scope, may have been misled by the proof of the utter baseness and want of principle as detailed against him. But in addition to all this, the court informed the jury that although the general character of the witness had been assailed, yet if it were sustained by an equal number of witnesses with equal opportunities of knowing, he stood before them unimpeached. The charge is erroneous. The character of a witness for veracity cannot be thus disposed of by balancing in a scale the number of witnesses deposing for or against him, together with their means of knowing his character. The fact that it is assailed by a single witness, casts a reproach upon it, and it then becomes a question to be decided upon by the jury like all other questions of fact, and is to be judged of not by the number of

[Morgan vs. McGhee.]

witnesses, but by their respectability and intelligence, consistency and means of information.

We are therefore of opinion, that the judgment of the Circuit Court be reversed, and that the prisoner be remanded for a new trial.

MORGAN vs. MCGHEE.

All marriages of a foreign country, consummated in pursuance of the forms and usages of such country, are recognized as valid by the laws of Tennessee; and therefore a marriage consummated according to the usages of the Cherokee tribe of Indians within that portion of Cherokee country which is within the limits of Tennessee, yet before the extension of the laws of Tennessee over it, was held valid.

Margaret Morgan instituted this action of detinue, for slaves, in the Circuit Court of Monroe county, against John McGhee. McGhee pleaded that plaintiff was the wife of Gideon Morgan, and being a *feme covert*, had no right to sue. Issue was taken on this plea, and the case was tried by Judge R. M. Anderson, and a jury of Monroe county, at the September term, 1844.

It appeared that McGhee had purchased the slaves at execution sale against Gideon Morgan; that Gideon Morgan and Margaret Morgan, *alias* Sevier, were married according to the usages of the Cherokee tribe of Indians in that part of the territory of the Cherokees which was within the limits of the State of Tennessee, in 1813; that all that was necessary by their usages was a public agreement to live together as man and wife; that they afterwards lived together as man and wife; that in 1818 they were married according to the ceremonies of the laws of Tennessee in the Cherokee country and before the laws of Tennessee had been extended over it; that Margaret Morgan and Gideon Morgan removed to Monroe county, and had some five or six children, who went by the name of Morgan; that he was a white man and she was a half-blood Cherokee, and that he prosecuted her claim to a portion of land in the Cherokee territory, reserved by treaty; that the slaves in controversy were delivered to Margaret Morgan in 1828 by her mother, &c.

[Morgan vs. McGhee.]

The Judge charged the jury, that if Margaret Morgan, *alias* Sevier, was married to Gideon Morgan within the limits of the Cherokee territory according to the usages of that tribe, the laws of Tennessee would recognize the marriage as valid.

The jury returned a verdict in favor of the defendant, and judgment was rendered thereupon, from which the plaintiff appealed.

Van Dyke and Gaut, for plaintiff in error.

Lyon and Crozier, for defendant in error.

TURLEY, J. delivered the opinion of the court.

The defendant pleads in abatement, that the plaintiff is a *feme covert*, upon which plea there is issue. The proof shows, that the plaintiff, Margaret Morgan and one Gideon Morgan were married in the Cherokee Nation of Indians according to the forms and ceremonies of the tribe sometime in the year 1813; that Margaret was a Cherokee woman residing in the Nation; that she and Morgan lived together many years as man and wife, and had a large family of children; that they are now living apart, and that he is alive. Upon this proof the jury found that the plaintiff was a *feme covert*.

We think the testimony supports the verdict. Our courts of justice recognize as valid all marriages of a foreign country if made in pursuance of the forms and usages of that country; and there is no reason why a marriage made and consummated in an Indian Nation should be subject to a different rule of action. The fact, that a portion of the lands inhabited by the Cherokee Indians was within the limits of the State of Tennessee, and that the marriage took place within that portion, cannot effect the question. The Nation of Cherokees was at the time independent of the State of Tennessee; her laws and usages had not been extended over it, and were not obligatory or binding upon it.

To hold this marriage to be void would be to vitiate all the marriages made in the Nation, and might be productive of much mischief.

[Crutchfield vs. Robins, Tingley & Co.]

The Circuit Judge committed no error in refusing a new trial.
Judgment affirmed.

NOTE—As to what constitutes a valid marriage by the laws of Tennessee. See *Bashaw vs. State*, 1 Yerg. 177; *Grisham & Ligan vs. State*, 2 Yerg. 589. *Sellers vs. Davis*, 4 Yerg. 503.

As to foreign marriages the general principle is, that the *lex loci* is the governing rule in deciding upon their validity or invalidity, as in all other personal contracts. The *lex loci* is to be considered in expounding or enforcing a contract, not from a blind deference or comity towards a foreign law, but because it is presumed that the parties had in view the laws of the country in which the contract was entered into, and that they meant to be governed by it. It is of the essence of the subject matter to ascertain the meaning of the parties. Therefore, the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate* but *ex debito justitiæ*. A marriage good by the laws of the country where consummated, is held good in all others where the question of its validity may arise. Shelford on Marriage and Divorce, 114: *Warrender vs. Warrender*, 2 Clark & F.: 9 Bligh. 110: Story on Conf. L. 36: 2 Kent, 457: 2 East, 453: 1 Bland. 485. A marriage celebrated abroad, and being void where celebrated, is invalid in England. Shelf. 123: 2 Hagg. 419.

The contract of marriage is a stable and sacred contract of natural as well as municipal law. 4 John. Ch. 501, 503.

CRUTCHFIELD vs. ROBINS, TINGLEY & Co.

A judgment is not discharged by payment to a Clerk or Sheriff of property or evidences of debt or anything but money. A receipt by such officers, of current bank paper, is a discharge of the judgment, unless it be objected to before the reception of it. Current convertible bank paper is money.

Crutchfield, the defendant in the Circuit Court, applied for and obtained a writ of *supersedeas* to stop the enforcement of a judgment against him in the Circuit Court of McMinn county, alledging that he had paid the judgment to the clerk, and taken his receipt in evidence thereof.

The case was tried by Judge Cannon and a jury, at the April term, 1844, when it appeared in evidence, that the defendant, Crutchfield, had paid part of the judgment in notes of the banks of the State of Tennessee, to the clerk, without objection being made thereto by Robins, Tingley & Co., plaintiffs in the judgment, and the balance by the satisfaction of several

[Crutchfield vs. Robins, Bingley & Co.]

judgments against the Clerk; and thereupon the Clerk executed a receipt in full of the judgment to Crutchfield.

The Judge charged the jury, that a payment made to the Clerk by an execution debtor in anything circulating as currency in the country, would be a good payment; but that a payment made in anything else but money, or what passes for money, would not discharge the defendant in the judgment, and that the plaintiffs would be entitled to execution against the defendant for the amount not paid in money, or that which circulated as money.

The jury accordingly rendered a verdict for so much as had been received in claims against the Clerk. The court perpetuated the *supersedeas* for the amount paid in bank paper.

Both parties appealed:

Van Dyke, for Robins, Tingley & Co.

Gaut, for Crutchfield.

TURLEY, J. delivered the opinion of the court.

Robins, Tingley & Co. recovered a judgment against Thomas Crutchfield for the sum of \$827 21 $\frac{1}{2}$ and costs of suit, in the Circuit Court of McMinn county, on the 19th day of August, 1842, upon which an execution was issued on the same day, and was placed in the hands of the Sheriff for collection on the 20th day of December, 1842, which execution was stopped by a writ of *supersedeas* on the 7th day of March, 1843. At the April term, 1844, of the Circuit Court for said county of McMinn, the case came on for hearing upon motion to quash the execution; when it appeared, that the defendant had procured a receipt in full for the debt from the Clerk of the court where the judgment was rendered, and from whence the execution issued; but that only the sum of three hundred and sixty-seven dollars of the amount was paid in money, and *that* in current bank notes of the State of Tennessee, and the balance by the satisfaction of several judgments in favor of the defendant against the Clerk. For the amount paid in money the execu-

[Crutchfield vs. Robins, Bingley & Co.]

tion was quashed by the Circuit Court, and the *superedeas* discharged as to the balance.

To reverse this judgment, a writ of error is prosecuted by both parties to this court, and the question presented, is, as to the validity of the receipt; the one side contending, that it is good at least for the amount proven to have been paid in money; the other, that it is good for nothing. The act of 1807, ch. 66, sec. 9, authorizes the payment of money upon judgments rendered, to be made to the Clerk of the court: the payment of nothing but money can be allowed under this statute, and a receipt given by the Clerk, the consideration of which is anything but money, such as debts due by himself, choses in action, or property, is not a satisfaction of the judgment, and no hinderance to its collection. *Lytle vs. Etherly*, 10 Yerg. But the question comes up, what is money? It is contended for the plaintiff in the execution, that bank notes are not, and that nothing but that which constitutes a legal tender under the constitution of the United States is, viz, gold and silver. Such is not our opinion. Money is a generic term, and covers every thing which by consent is made to represent property, and passes as such currently from hand to hand, whether it be the iron of the Spartans, the cowry of the African, the gold and silver of the world, or the paper of Modern Europe and America: current, convertible bank paper has been invariably held, both in Europe and the United States, to be a good legal tender in payment of debts, unless it be objected to upon the ground, that it is not gold and silver. This could never have been done, had it not been considered as money, as nothing but money can be tendered in payment of a debt. The Sheriff, as well as the Clerk, receives money upon judgments. They both receive it as officers of the court, and for the suitors of the court: it is true they may refuse to receive any thing but gold and silver; but who has ever dreamed that a payment to a Sheriff in current convertible bank paper, was not a satisfaction of the judgment? It would be productive of immense confusion so to hold it, and force a payment in all cases in gold and silver, and this for the protection of the Sheriff and the debtor; for if the payment be not legally made, it is as if there

[Crutehfield vs. Robins, Bringley & Co.]

were no payment; the Sheriff having acted out of the line of his duty, his securities are not responsible for the act; the judgment not having been satisfied, the debtor may be made to pay it again; and if the Sheriff should be irresponsible, he necessarily loses the first payment, and so of payment to the Clerk. Such consequences would be very destructive, and the inconvenience of so holding the law, intolerable. But it may be said, that in cases of contracts to pay so many dollars of Tennessee bank notes, it has been held that debt will not lie, and that the contract is not for money. This class of cases are *qui generis*, and have been determined upon their own peculiar circumstances. They are contracts made with a view to a depreciation of the paper; they are not contracts for so many dollars of money in general, but for so many of that particular kind of money; and in this respect stand upon somewhat the same footing as contracts to pay so much foreign money, viz, of sovereigns, moidores, rix dollars, or rupees, the value of which is unknown, it depending upon the rate of exchange and usage, the necessary consequence of which is, that the action upon them sounds in damages. And so the contract to pay bank notes has been held to be a contract to pay so many dollars of that particular money, and in as much as it may be worth less than the standard dollar, which it was intended to represent, it is to be scaled, and, therefore, the action sounds in damages, and debt will not lie, and as a legal consequence, it is not a contract for the payment of money *in numero*. But when the paper money is of standard value, it passes as money, is received as money, and is subject to the same rules regulating payments when made, as if it were gold and silver.

We are, therefore, of opinion, that current convertible bank notes are money; that a payment made in them, whether to the principal or his agent, is a good payment, and affirm the judgment of the Circuit Court as rendered in the case under consideration.

GILMAN vs. KIBLER.

1. Where authority is given to the payees of a bill single to affix the name of an individual to such instrument as a surety, *if such payees desired a surety*, the payees could signify their acceptance of him as a surety in no way than by the execution of the power, which must be done in a reasonable time.
2. Where authority is given to the joint payees of a bill single, who are not partners, *it seems*, in the event of the death of one of the joint payees, it cannot be executed by the survivor.
3. By the act of 1801, ch. 25, sec. 1, a promise to be bound for the debt, default or miscarriage of another, must be in writing: the consideration of such promise need not be in writing to make it a valid agreement. *Taylor vs. Ross*, 3 Yerg. 333.
4. To render one responsible for the debt of another, the consideration passing between the original parties to a previous agreement, is not sufficient. There must be a new consideration passing between the new parties.
5. An agreement to forbear suit is a good consideration; but where the party sought to be charged, merely wrote a letter to the creditor, stating that if he required a surety he was willing to be bound, but no acceptance of him as such took place: It is held, there was no agreement to forbear and no consideration passing between the parties.

Samuel Kibler, as surviving partner of Samuel and Joseph Kibler, sued Gilman in assumpsit in the Circuit Court of Washington county. The defendant pleaded *non assumpsit* and *non est factum*, and issues were formed on these pleas.

The case was tried at the October term, 1843, by Judge R. M. Anderson and a jury. A verdict and judgment were rendered in favor of the plaintiff, from which the defendant appealed.

All the facts of this case, so far as they bear on the questions determined, are explicitly stated by the court.

Nelson, for the plaintiff in error.

1. The plaintiff in this case below signed the name of defendant, Gilman, to the bill single as a surety, under and by virtue of a letter addressed to Samuel and Joseph Kibler, after the death of Joseph, and after suit was commenced on the bill single. This he had no power to do. A surviving obligee cannot execute a power conferred on both obligees. Theobald, 242: Story on Agency, 44: Pitman, 48: 13 Petersdorff, 509. 5 Yerg. 71, was a case of partnership. See 4 Kent, 326.

2. The instrument signed was not the instrument authorized to be signed. See 5 Yerg. 193: 13 Petersdorff, 543, 544: Comyn

[*Gilman vs. Kibler.*]

on Contracts, 213. The term note does not mean a sealed instrument. Meigs, 99: 10 Yerg. 228, 247.

3. The payees could not be the agent of Gilman, to make a note payable to themselves. See Pitman, 68: Story on Agency, 11, sec. 9.

4. There should have been an acceptance of the proposed guaranty, and notification to the guarantors. There was none. Pitman, 39, 40: Comyn on Con. 197. Gilman's letter was dated 26th July, 1838; suit was brought 12th July, 1839.

5. There was no consideration proved passing between the plaintiff and defendant. The consideration passing between the Kiblers and Creasay, was not sufficient. There should have been a consideration passing between the Kiblers and Gilman. 3 Kent. 122: 38 Law Lib. 54, 55.

6. The Judge charged the jury, that "a benefit resulting to Gilman or Creasay from the guaranty, or a detriment injury, delay or loss to the Kiblers, would be a sufficient consideration to bind Gilman, the guarantor; such as extending the credit, or a promise or contract of longer definite time to Creasay for payment, or any other detriment or loss to the Kiblers in consequence of the guaranty, would be a sufficient consideration to support the guaranty or make it binding. If no advantage resulted either to Creasay or Gilman, or disadvantage, loss or delay to the Kiblers, in consequence of the guaranty, at the date thereof or subsequently, then it would want a consideration and be void in law."

The court clearly erred in placing the consideration on the naked ground, without any qualification, of "any other detriment, loss, delay or disadvantage to the Kiblers." To constitute a consideration on the ground of detriment, loss, delay or disadvantage to the Kiblers, the Kiblers on their part, should have been bound by some contract, either parol or written, with Creasay or Gilman, by which they were to forbear to sue, or bound to do some other act creating the detriment, loss, disadvantage or delay. The mere fact of delay on their part, without any contract binding them to it, would not be sufficient. "Definiteness and certainty," says Theobald, p. 4, No. 8, "as opposed to the vague and general, are necessary in the terms of

[Gilman vs. Kibler.]

every consideration. Thus the stipulations of forbearance to sue for a time, or some time, or a little time have been adjudged insufficient considerations." The same doctrine is contained in Pitman's Treatise: 38 Law Lib. 55. Mutuality in the consideration—something to be done on the one side and forbearance on the other—is here evidently contemplated. Comyn, in defining a guarantee, says, in his work on Contracts, 182 top, 191 foot, that "to make such an obligation binding, there must be some good consideration moving from the party with whom it is made, as, for instance, the sale and delivery of goods to, or work to be done on credit for the person on whose behalf the guarantee is given, or in consideration of a creditor giving time, or forbearing to sue his debtor for a precedent debt, and the like." There must be a contract, understanding or agreement between the parties at the time the guaranty is given and not subsequently. All the cases concur in this, that the consideration for the original debt will not attach to the subsequent promise, and that the promise to pay must arise out of some new and original consideration of benefit or harm, moving between the newly contracting parties. 3 Kent, 123: 6 Yerg. 418.

The charge of the Circuit Judge was not in conformity with these principles, was erroneous, and the judgment should therefore be reversed.

Arnold, for the plaintiff in error.

John A. & R. J. McKinney, for the defendant in error.

REESE, J. delivered the opinion of the court.

It appears from the record in this cause, that one Pleasant Creasay purchased a quantity of flour from Jacob Kibler and Samuel Kibler. It does not appear whether the Messrs. Kibler constituted a co-partnership firm, either general or limited.

To secure to them the payment of the price of the flour so purchased, Creasay on the 27th day of January, 1838, executed his bill single, or covenant of the following tenor:

[Gilman vs. Kibler.]

"On or before the first day of May next, I promise to pay Jacob and Samuel Kibler, three hundred and fifteen dollars in good sound State Bank Notes, State of Georgia, Tennessee and Alabama, all of either or part as may suit said Creasay, the same for value received, this 27th January, 1838.

PLEASANT CREASAY, [Seal.]"

On the 27th day of July, 1838, Joseph B. Gilman, the defendant in this case, transmitted to the Messrs. Kibler the following letter:

"Mr. Jacob Kibler and Samuel—Gentlemen—You hold a note of hand on Pleasant Creasay for \$315, which I am a witness to, and should you require security, I request you to place my name to the note, and this order shall be your voucher for the same. With much respect, I am your friend,

JOS. B. GILMAN.

Fall Branch, July 27th, 1838."

The Messrs. Kibler received the above letter on the day of its date, but did not then place the name of the writer to the bill single or covenant of the said Creasay above set forth. Whether they did not require security to the same, or did not think it well described and identified by the terms of the letter, being a sealed covenant and not witnessed by Gilman, or whether being payees thereof, they questioned either the legality or the propriety and prudence of their affixing the name of another, does not satisfactorily appear. But so it is, they did not affix the name of Gilman to the instrument. Several months afterwards Jacob Kibler died, the name of Gilman not then being affixed to the instrument. On the 12th of August, 1839, this suit was brought, and the name of Gilman was not then affixed to the instrument. After the suit was in court, the signature "Joseph B. Gilman by Samuel Kibler" was placed upon a blank paper, which was appended to the instrument below the signature and seal of said Pleasant Creasay, and thereon a declaration was filed.

The first count is the ordinary count in assumpsit against Gilman as the maker of a promissory note. The second count is *indebitatus assumpsit* for flour sold to Gilman and Creasay. And the third alleges, that flour was sold to Creasay, and that

[Gilman vs. Kibler.]

Gilman became bound and liable to pay, and promised to pay therefor. As to the first count, the defendant pleads on oath, under the statute, that he did not sign the instrument or authorize its signature, upon which there was issue. Non-assumpsit was pleaded to the other two counts and issue taken thereon.

Verdict and judgment were rendered in favor of the plaintiff below. A motion for a new trial was made by the defendant, which was overruled by the court, and the defendant has prosecuted his appeal to this court. And here it is correctly admitted by the counsel for the plaintiff below, that no recovery could be had upon the second and third counts of the declaration. The action can be maintained upon the first count, if the signature of Gilman's name to the instrument, under the circumstances of time, manner, &c. were valid, and founded upon an adequate consideration. The first will depend upon a construction of the letter or written authority; the latter upon the proof. "If you should wish security, you are requested to place my name on the note." The construction of this clause, which indeed is the whole of the matter, can present no difficulty. It is not the creation of an absolute or independent obligation; it is merely the authority to create one, if the agent should think it for his interest to do so. "If you should wish security, you are requested to place my name to the note." Can the Messrs. Kibler upon this say, we do wish security, but we will not place your name upon the note. Nevertheless, we hold you bound upon the letter? Certainly not. The only mode in which they could signify and assert that they wished and required security, was by placing the name of Gilman upon the note. If they did not do so, they thereby furnished evidence that they did not require his security. The covenant had been in existence six months; it had been due nearly three months. Under these circumstances did the letter mean, "if you should not require security *now*, because you may believe Creasay to be good, or for any other reason, still, if twelve months hereafter, from a change in his circumstances, you should require security, then place my name to the note?" It can be held to mean no such thing; and, therefore, if Jacob Kibler had continued to live, and had joined in the act of affix-

[Gilman vs. Kibler.]

ing the signature at the time it was done, the act could not have been sustained, we think, by a correct construction of the power. The acceptance of Gilman as surety, could be manifested, as we have said, in no other way than by the execution of the power; and such acceptance and execution could not be left an open question indefinitely, and at some future time, or under other circumstances, be given and performed at the election of the Kiblers. It is, therefore, not necessary to enquire into the difference of the execution of the power as it was attempted by the surviving Kibler, and its execution by both. We will state, however, that in a case like this, where neither the writing nor proof, *aliunde*, show a partnership, it would be difficult to maintain, other objections aside, the execution of the power by the survivor. The view which we have taken of the construction of the instrument removes or diminishes the necessity of much or any discussion on the other branch of the question, namely, the consideration required to render the defendant liable upon his signature to an instrument already in existence and founded upon a past consideration between others. The letter or agreement upon its face shows no consideration whatever. Under our statute of frauds it has been settled, that it need not do so. It is sufficient that a valid consideration exists. It may be proved *aliunde*. The past consideration will not maintain the promise; it is necessary that there should be a new consideration between the new parties. This may be either some benefit or advantage to the promisor, or some detriment or loss connected with or arising out of the agreement itself to the promisee. The consideration here insisted on, is an agreement to forbear suit against Creasay. There is no satisfactory proof of the existence of such an agreement. If in consequence of the reception of the letter from Gilman by the Kiblers, any loss or detriment in fact followed to the latter, without their having made any agreement to forbear, this would not be such a loss or detriment as would amount to a consideration maintaining the promise of Gilman; and yet such seems to be the meaning of the charge of the Circuit Court upon this point of the case. And so far we think the charge was erroneous.

[*Gilman vs. Kibler.*]

Many other questions were discussed in the Circuit Court and have been again discussed here, into which we do not deem it necessary to enter. And many facts, very discreditable to the plaintiff in error, have been voluminously accumulated upon the records, because he, not placing himself upon the just and legal grounds of defence which we have in this opinion set forth, chose, by the most questionable means, to represent a state of the facts contrary to the truth, by the introduction of spurious or suppositious papers for the covenant and power of attorney or letter produced and relied on by the plaintiff below.

But to whatever just indignation the plaintiff in error may, on this ground, have subjected himself, it cannot of course deprive him of the benefit of that available defence to which, in the former part of this opinion, we have shown that he is entitled.

Let the judgment be reversed, and a new trial of the case be had in the Circuit Court.

*CHESTER et al. vs. GREER et al.**GREENWAY et al. vs. GREER et al.*

1. A deed may be registered by the vendee without the knowledge or consent of the vendor, either during the life of vendor or after his death; and when registered it operates as a conveyance of the legal title *as against vendor* from the date of the deed.
2. Where vendee registered his deed for land after the death of the vendor, and not before, it is held that the vendor did not die seized and possessed of the land, and that his widow was not endowable of such land.
3. The assent of an executor to a legacy must be obtained before it can be legally reduced to possession by the legatee; but this assent need not be expressly proved. It may be inferred from the circumstances attending the transaction, and this as well where the executor is legatee as where he is not.
4. A limitation resting on the death of an individual without issue, rests on an indefinite failure of issue, and is void for remoteness whether created by deed or will.
5. Where a wife joins her husband in the sale of her real estate without an agreement in reference to the proceeds of the sale, the proceeds vest absolutely in the husband.
6. The failure to register a deed makes it void, as to creditors, by statute. No one, however, can be regarded as a creditor till he has established his claim by a judgment, and no deed can be questioned for want of registration or for fraud but by a judgment creditor.
7. A purchase of property by a *cestui que trust* at a sale made by the trustee, is illegal and voidable at the instance of judgment creditors.
8. If a person having an incumbrance or security upon an estate, suffer the owner to procure additional money upon the estate by lien or mortgage, concealing his incumbrance or security, he shall be postponed to the second incumbrancer. It is otherwise where he denies that he has an incumbrance on the estate without being informed that the second incumbrancer intends to loan money on the faith of the estate; nor will the mortgage be voidable for fraud by false declarations as to the existence of the mortgage, where debts are created on the faith of such declarations without lien taken on the estate for the security of such debt.

These bills were filed in the Chancery Court at Jonesborough. One was filed by Eliza R. Chester, the widow of Samuel G. Chester, dec'd, and by his heirs, against Hartsell and Greer, the beneficiaries in a deed of trust executed by the deceased on all his real and personal estate, and against Sparks, the trustee.

This bill prayed that a dower out of the real estate might be allotted to her on the ground that the deed of conveyance not having been registered in the lifetime of the deceased, he died seized and possessed of the same; and also prayed as executrix, that the slaves be decreed to her on the ground of certain clauses in the will of her deceased father, limiting the title of the slaves.

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

The other bill was filed by J. M. Greenway and J. C. Greenway, alledging themselves to be creditors of Chester, deceased, praying that the deed of trust executed by Samuel G. Chester, for the benefit of Hartsell and Greer, his endorsers, be set aside as fraudulent and void by reason of the declarations of said Greer and Hartsell in reference to the existence of said deed; and that if it should not be set aside, that then the sale of the property under the trust, which was purchased by Greer and Hartsell, be set aside as fraudulent and void, and a re-sale ordered.

At the May term, 1844, the two cases were consolidated by consent of parties, and came on for final hearing together on bills, answers, replications and proof.

The presiding Chancellor, Williams, dismissed the bill of Mrs. Chester, but without cost, but declared the trust sale void, as to creditors, and ordered a re-sale and an account to be taken, &c.

The complainants appealed.

The facts are fully stated in the opinion of the court.

R. J. McKinney, for Greenway.

J. A. McKinney, for Eliza Chester.

Nelson, for Greer.

TURLEY, J. delivered the opinion of the court.

In the year 1817, Eliza R. Gardner, daughter of Henry Gardner, was married to Samuel G. Chester, in the State of North Carolina. In the year 1818, Henry Gardner departed this life, having previously made and published his last will and testament by which he devised to his daughter, the said Eliza, two slaves, Sam and Maria; to another daughter, Emily, two slaves, Ben and Esther; to his wife Catherine, the one half of the residue of his estate, both real and personal, during her natural life or widowhood, and at her death, the whole of his estate to his said two daughters Eliza and Emily, share and share

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

alike to them, their heirs and assigns forever; but in case of their death without issue, with limitation over to his sister Elizabeth and her heirs forever. To this will the said Catherine, Eliza, and Emily were appointed Executrices. Upon the death of Henry Gardner, Samuel G. Chester and his wife Eliza, received into possession the two negroes given to her absolutely by the will. In 1831, Catherine, the wife of Henry Gardner and mother of Eliza R. Chester, departed this life, and the property devised to the said Eliza and her sister Emily upon the happening of that event, was divided by mutual consent between them, each taking possession of their respective portions; in making this division, Chester and wife sold and conveyed a portion of the land belonging to the wife under the will, to her sister, in satisfaction of a balance in her favor upon the division of the negroes. This deed bears date the 12th of March, 1832, and from that period, Chester and wife had the uninterrupted possession of the negroes in dispute up to his death, which happened sometime in the month of June, 1841. On the 19th day of July, 1839, Samuel G. Chester executed a deed of trust to James L. Sparks, upon the negroes received by him in right of his wife under the will of Henry Gardner, and upon his real estate in Washington County, Tennessee, to secure Samuel Greer and Jacob Hartsell from loss, by reason of their liability as his endorsers in Bank, with power to the Trustee, to expose the same to public sale in Jonesborough, upon ten days notice, to reimburse any payments that said Greer and Hartsell might have to make for said Chester as his said endorsers. This deed of Trust was not proven and registered until after the death of Chester in 1841. Nothing was known of its existence to any one but the parties and the subscribing witnesses. In the interval between its execution and probate, Chester contracted debts with others, which remain unpaid, and for the satisfaction of which there is no other property than that specified in the deed of trust. Samuel Greer, one of the beneficiaries, was on several occasions enquired of as to whether he had any mortgage or encumbrance upon Chester's property, and always answered that he had not, and that in his opinion persons might contract debts with him in safety.

[Chester et al. vs. Greer et al. —Greenway et al. vs. Greer et al.]

Upon the death of Chester, Greer & Hartsell caused the deed of Trust to be registered. Greer administered upon his estate, took possession of the negroes, but did not return them in the inventory. And afterwards Hartsell having assumed the debts in Bank, for which they were liable as Chester's endorsers, they afterwards procured the Trustee to expose the land and negroes to public sale according to the terms of the trust, and became themselves the purchasers by their agent for a sum much less than the actual value of the property then sold; and thereupon Eliza Chester files her bill claiming dower in the real estate conveyed by the deed of trust, and the right to the possession of the negroes against the trust as executrix of the will of her deceased father, Henry Gardner; and J. M. and J. C. Greenway, file their bill as creditors of Samuel G. Chester in their own name and in behalf of his other creditors, asking that the deed of trust be declared fraudulent, and void against such creditors, and if this cannot be done, that the sale made under the trust be set aside for illegality, the *cestuis que trust* not being warranted by law in becoming the purchasers at their own sale, and that a new sale be ordered, subject to the legal rights of all persons interested therein.

Upon this statement of facts, several questions are presented for the consideration of this Court, arising out of the claims of Mrs. Chester as presented in her bill, and those of the creditors of Samuel G. Chester as presented in the bill of J. M. and J. C. Greenway.

On the part of Mrs. Chester.

1st. Is she entitled to dower out of the land, conveyed in the deed of trust? We are of the opinion that she is not. By the provisions of the act 1784, ch. 22, sec. 18, a widow is endowable of the one third part of all the lands, tenements and hereditaments of which her husband died seized and possessed. Did Samuel G. Chester die seized and possessed of the lands conveyed by him in the deed of trust? It is contended that he did, because the deed of trust not having been registered at the date of its execution, can only have effect from the date of its registration, which being subsequent to his death, it necessarily follows, that he did die so seized and possessed.

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

The fallacy of this argument consists in the assumption that the deed of trust was operative and effective between the parties only from the date of its registration. By the 1st sec. of the act of 1831, p. 90, it is required that deeds for the absolute conveyance of lands, mortgages, deeds of trust, &c., shall be acknowledged by the party executing the same, or be proven by two subscribing witnesses and be thereupon registered. By the 4th sec. of the same act it is provided that instruments so proven and registered shall take effect only from the time they are registered, and any deed of conveyance or other instrument which shall be last executed but first registered, shall have preference unless it is proved that such subsequent purchaser had full notice of the previous conveyance, and that the liens of judgments and executions shall have preference to any deed or other instrument not registered at the time the lien of said judgment or execution attached. This section makes provision for the cases of conflicting purchasers and judgment creditors, and postpones an unregistered deed though of prior execution to the deed of a subsequent purchaser without notice which has been registered, and to judgment creditors, whose judgments have been obtained before such registration, and does not purport to affect the relation as existing between the vendor and vendee by the execution of the deed which has not been registered as is required by the 1st section of the act. The 12th section provides that all such deeds and other instruments mentioned in the 1st section, and not proven and registered as is required, shall be null and void as to existing and subsequent creditors and *bona fide* purchasers without notice. This section also leaves the relation of the parties to the deed unaffected by the neglect to register according to the provisions of the act.

What then is the operation of an unregistered deed as between the parties? It has been held in North Carolina and repeatedly in this State, that it conveys an inchoate legal title, which may at any time be made perfect by registration, and this by relation from the date of the deed. And this registration may be procured by the vendee in the deed without the knowledge or consent of the vendor, and either during his life

[Chester et al. vs. Groer et al.—Greenway et al. vs. Groer et al.,

or after. It necessarily follows, that as between Chester and the Trustee in this deed of trust, the freehold in the lands conveyed was passed by relation upon the registration of the deed from the day of its date, and that of consequence, Chester did not die seized or possessed of the premises so as to entitle his widow to dower therein under the act of 1784. 2nd. It is contended that Chester never had possession of the negroes conveyed by said deed of trust in his own right, but only in the right of his wife as executrix of the will of her father. It is true that the assent of an executor to a legacy must be obtained before it can be legally reduced to possession by the legatee; but this assent need not be expressly proven; it may be implied from the circumstances attending the transaction, and this as well where the legatee is executor, as where he is not. Under all the circumstances of this case we cannot hesitate in saying that these negroes were reduced to the possession of Chester not in the right of executor, but as legatee, and with the knowledge and assent of the executor: the settlement and division of the estate between the two Sisters upon the death of their mother, and the great length of time which has elapsed since, render any other conclusion preposterous and absurd. 3rd. It is contended that the limitation over of the negroes to Elizabeth Rhodes the sister of Henry Gardner the devisor, upon the death of Mrs. Chester and her sister Emily without issue, is a good limitation, and that therefore she holds the negroes in trust for this limitation, that Chester acquired no marital right to them, and of consequence could convey none by the deed of trust. To this objection there are two satisfactory answers. 1st. The limitation over is void for remoteness. We deem it unnecessary to enter into a minute investigation of this perplexed and perplexing question. It has been again and again examined by our Courts, and it has been invariably held that a limitation depending upon an indefinite failure of issue, whether created by deed or will, is void; and that a limitation resting upon the death of an individual without issue, is such an indefinite failure. We will, however, examine two cases which have been relied on as supporting a contrary position, with the view of showing their inapplicability.

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

The 1st, is the case of *Didlake vs. Hooper*, 1st Virginia Rep. 194. The clause of the will out of which the controversy arose in that case was as follows:—"Item. To my son Jeremiah Hooper during his life, one hundred acres of land: I do lend him three negroes during his life, and if he should have lawful issue, I give the land and negroes to them at his death; and if he should die without issue, I give the whole of the property, that I have lent to him to Sarah and Judith Hooper." This was held to be a good limitation, and manifestly because it does not rest upon an indefinite failure of issue, but a failure at the death of the devisee Jeremiah Hooper. The property is loaned to him for life, and if he have lawful issue, it is given to them at his death; if he died without issue, it is then limited over to Sarah and Judith Hooper—his death then is the period which is to determine whether the limitation is to vest or not. If he have issue, the property is absolutely theirs; if not, it belongs to Sarah and Judith Hooper.

The other is the case of Jackson on the demise of *St. John vs. Chew*, 12th Wheaton Rep. 153. That case was this: Medcef Eden devised to his son Joseph, certain portions of his real and personal property to have and to hold to him, his heirs, executors and administrators, forever. In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property and added the following clause:—"Item. It is my will and I do order and appoint, that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." Joseph died in August, 1812, without issue, leaving his brother Medcef alive, and the question was what estate Joseph took under the will, and it was held to be an estate in fee defeasible in the event of his dying without issue in the life time of his brother, and that the limitation over was good as an executory devise. It is to be observed of this case, that Justice Thompson who delivered the opinion of the Court, rests it upon the decisions of the Supreme Court of New York, from whence it came. He says:—"It is not deemed necessary in the present case to enter into an examination of the various decisions upon the question, either for the purpose of attempting to reconsider them, or to extract from them principles, which

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

might be applicable to the case before the Court, if the question was considered entirely an open question. The enquiry is very much narrowed by applying the rule which has uniformly governed this Court, that where any principle establishing a rule of real property, has been settled in the State Courts, the same rule will be applied by this Court. The enquiry then is, whether the question arising in this case has been so settled in the State Courts of New York, as to be considered at rest there," and upon examination of the decisions of that State upon the point it was held so to have been settled. It is further to be observed, that the correctness of the decision manifestly rests upon the word "*survivor*" used in the devise to the testator's sons, thereby limiting the failure of issue to the period of the death of one or the other, upon the happening of which event the estate in the whole of the property became indefeasible in the survivor, so that the limitation did not rest upon an indefinite failure of issue, and in this respect was similar to the case of *Jackson vs. Blanshaw*, 3d John. Rep. 289, where the testator devised all his estate real and personal to his six children, to be equally divided between them share and share alike, but if any of them died before arriving at full age, or without lawful issue, that then, his, her or their part should devolve upon and be equally divided among the surviving children, and to their heirs and assigns forever. In that case, Chief Justice Kent reviewed some of the cases in New York and England upon this subject, and held the devise over to be a good executory devise, because it was to take effect upon a failure of issue at the death of the first taker, and not upon an indefinite failure of issue. These two cases then are not applicable, as has been insisted, to the one now under consideration, and strengthen instead of weaken the view we have taken of it. But 2nd, if it were otherwise, and the limitation over were good, Mrs. Chester would take under the will an absolute interest, in the negroes devised to her by the will of her father, defeasible upon the happening of the event upon which the limitation over depended, to wit, her dying without issue. This would not constitute her a trustee for the benefit of the executory devise, but she would have a legal title to the negroes to which the marital right would attach, and

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

which her husband might well convey by the deed of trust. 4th. It is contended that in as much as Mrs. Chester joined her husband in the sale and conveyance of her real estate, she is thereby entitled to charge her husband's estate with the value thereof, and to have satisfaction thereof in her own right as against the deed of trust, and the creditors of her husband. This principle we cannot recognize as law; if the wife consents to the sale of her real estate and joins her husband in a conveyance of it, made according to the forms of law, without an understanding or agreement, that the proceeds are to be held, or vested for her use, or that she is to be remunerated out of the estate of her husband, all her interest in the estate is gone, and her husband holds the consideration for which it was sold in his own absolute right, discharged from any claim of hers paramount to his. These constitute all the grounds upon which Mrs. Chester's right to relief in this case is rested. We have examined them with as much care as time and circumstances would permit, and as has been seen, find nothing in them to warrant us in giving her relief.

On the part of J. M. & J. C. Greenway, who file their bill in behalf of themselves and the other creditors of Samuel G. Chester, it is contended,

1st. That the deed of trust is void as to them for want of registration in proper time, these debts having been contracted before the registration of the deed.

To this it is answered that though by the provisions of the 12th section of the act of 1831, ch. 90, all deeds and other instruments mentioned in the first section of the act and not registered as is therein provided for, are void as to existing or subsequent creditors, yet by this is meant judgment creditors, and not creditors *in pais*; that J. M. & J. C. Greenway, the complainants who file the bill, are not from their own shewing judgment creditors of Samuel G. Chester, but if creditors at all, creditors *in pais*, and that no other person claiming to be such judgment creditor, has applied to be admitted to prosecute his claim under the bill; and that therefore, they have no right to question the deed, for want of registration in due time, they not being protected by the Statute. Such are the facts of the

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

case, and the objection to the relief sought is in our opinion unanswerable. We know of no case where creditors are protected against fraudulent or unregistered deeds in which it has been held, that other than judgment creditors are entitled to claim the benefit of such protection. No man can be recognized as a creditor until he has established his right to claim in that character by a judgment at law or a decree in chancery; and to permit suits in equity to set aside deeds for fraud or want of registration in behalf of persons so claiming before the right has been thus established, would be to encumber Courts of Chancery with endless litigation, to compel them to adjudicate contracts cognisable only at law, and in many instances, to determine the fact of indebtedness, before the question of fraud in the execution of the deed, or the want of registration could be adjudicated. Such is not, as it ought not to be, the law. The authorities to this point are numerous, 10th Yerger, 133, *Woods vs. McGavock*. 15th Johnson, 571, *Murray vs. Riggs*. 2nd Lomax, Dig. 367–8, and the authorities cited.

2nd. It is contended on the part of the creditors, that the deed of trust, is void for fraud on the part of the *cestui que trust*, in this, that it appears that one of them, Samuel Greer, upon being interrogated as to whether he had a mortgage or trust upon the property of Chester, denied that he had and asserted that he was solvent, and that persons might contract debts with him in safety. It is difficult to justify this conduct on the part of Greer, but still it does not affect his rights under the deed of trust as the case is presented to our consideration. The complainants, from their own shewing are not in a condition to take advantage of this objection for two reasons. 1st. They are as we have already held creditors *in pais*, having neither judgments against Chester, nor liens upon the property conveyed in the deed of trust. In Coote on Mortgages 16th Law Library 185, it is said the right of priority may be lost by fraud, as if A. being about to lend money to B. informs C. of his intention, and asks C. whether he has any incumbrance on B's estate, and C. denies that he has any, whereby A. is induced to lend his money to B., and it proves that C. had at the time an existing mortgage or judgment on A's estate, this is a fraud on

[Chester et al. vs. Greer et al.—Greenway et al. vs. Greer et al.]

the part of C., and his security shall be postponed to that of C. Mr. Story in his Treatise on equity jurisprudence page 392, sec. 390, says:—"If a person having an encumbrance or security upon an estate suffer the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior encumbrance or security, he shall be postponed to the second encumbrancer. Thus if a prior mortgagee knows that another person is about to lend money on the mortgaged property, should deny that he had a mortgage, he would be postponed to the second mortgagee who should lend his money on the faith of the representation so made." The authorities to this point are numerous, and are referred to by Coote and Story at the pages of their works above quoted. These authorities prove that the fact of misrepresentation, although a debt *in pais* may be contracted under it, will not vitiate the lien acquired by the mortgage or deed of trust, but that to have that effect a subsequent lien must be acquired upon the same property by the debtor, contracting under the mistake induced by the false information thus communicated to him. But 2nd., it is necessary to fix the fraud upon the prior encumbrancer that he should be informed of the intention of the person making the enquiry to lend money upon the credit of the encumbered property, for otherwise the fraudulent intention is wanting, and the mere falsehood is not sufficient for such purpose. Coote on Mortgages, 185. 2nd Vernon 554, 1st Vernon 136, 2nd Vernon 151. Such is not the case with any creditor in the case under consideration so far as the proof shows. 3rd. It is contended that the purchase of the property by the *cestuis que trust*, under the sale made by the trustees was illegal and voidable, they not being permitted to bid at their own sale, they having the control of it, and their interest being directly at variance with that of the creditors of Chester, they being interested in getting the property at as low a rate as possible, and the creditors, in its commanding the highest possible prices; and so we think; but can make no decree upon the subject, in as much as we hold that none of the parties complainant in this transaction, as they are at present situated have the right to come into a Court of Chancery upon this subject. But it has been said that the defen-

[Boyd vs. Dodson.]

dants have not appealed from the decree in the creditor's bill, and therefore that they have no right now to object to it. To this it is to be answered, that the want of equity on the part of the creditors is apparent upon the face of the bill; that the bill was demurred to, and the demurrer was overruled by the chancellor, and that a general appeal by the complainants opens the question of jurisdiction upon the demurrer in this Court. We are therefore, upon the whole view of this case, of the opinion that neither the bill of Mrs. Chester, nor the bill of the creditors can be sustained, but they must both be dismissed.

BOYD vs. DODSON.

An agent cannot bind his principal by writing under seal, unless he act by virtue of an authority under seal, and no previous parol assent or subsequent parol adoption will sustain the act of the agent.

Debt on a bill single. Plea, *non est factum*.

Defendant proved, that Oliver Dodson signed his name to the bill single.

The plaintiff proved, that defendant had given verbal authority to Oliver Dodson to sign his name. He also proved, that plaintiff said to defendant, "I have sued you:" to which defendant replied, "Yes, you sued me, and the note is a just one; and if you had called on me for the money by instalments I would have paid you, but as you have sued me I will not."

Verdict and judgment for defendant, and an appeal.

Per curiam. Let the judgment be affirmed, on the authority of cases adjudged. 1 Hum. 113; 1 Yerger, 26, 31.

Vandyke, for Boyd.

Gaut, for Dodson.

WHITE vs. CAMPBELL et al.

1. When a corporation is dissolved or expires, its personal estate vests in the State, its real estate reverts to the original grantor and his heirs, and the debts due to and from it are extinguished.
2. Where a note was executed to a defunct corporation, and deed of trust to secure such debt, the note and deed are both void, the first for the want of a payee and the last for the want of a *cestui que trust*.

This bill was tried by Chancellor Williams, on bill and answer, at the April term, 1844, of the Chancery Court at Knoxville. He dismissed the bill, and complainant appealed.

W. G. Swan, for complainant. He cited 13 Peters's Rep. 585; 2 Kent, 305; 8 Peters's Rep. 281; 1 Blackstone, 434; Ang. & Am. 513; 2 Story's Eq. 236; 4 J. C. R. 497; 5 Cond. Rep. 371.

J. Crozier, for the defendant.

TURLEY, J. delivered the opinion of the Court.

On the 19th of January, 1844, defendant Campbell executed his note for the sum of \$3400, to the President, Directors and Company of the Bank of the State of Tennessee; to secure the payment of which, he on the same day executed a deed of conveyance in trust, for the premises in controversy, to defendant Cummings. On the 19th of February, 1844, complainant obtained a judgment in the Circuit Court of Knox, against said defendant Campbell, for the sum of \$2,500 and costs of suit, upon which execution has been issued, and levied upon the real estate conveyed in the deed of trust. The charter of incorporation of the President, Directors and Company of the Bank of the State of Tennessee expired on the 20th day of November, 1841; and the complainant files his bill to have the deed of trust set aside as an illegal incumbrance upon the property, and a hinderance to the satisfaction of his judgment at law.

That the Bank of the State of Tennessee was not in existence at the time the note and deed of trust were executed, is not, and cannot be controverted. The necessary consequence is, that

[White vs. Campbell.]

both the note and deed of trust are inoperative and void,—the one for the want of a payee, and the other for the want of a *cestui que trust*. Chancellor Kent, in the second volume of his Commentaries, says: "According to the settled law of the land, upon the civil death of a corporation, all its real estate remaining unsold reverts back to the original grantor and his heirs; the debts due to and from the corporation are all extinguished; neither the stockholders nor the directors or trustees of the corporation can recover the debts or be charged with them in their natural capacity; and all the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." 2 Kent's Com. 307, 2d edition. These principles would prevent a recovery of the debt intended to be secured by the deed of trust, even if it had been executed before the expiration of the charter; *a fortiori* will it, it having been contracted after. But it is argued, that it appears from the answer of the defendant, that the debt was fairly due from defendant Campbell, and that the intention in executing the note and deed of trust was to secure the stockholders in that amount, and not the institution. This argument is a fallacy. We cannot recognize the existence of stockholders of a defunct corporation, and we cannot in this case go behind the note and deed, to hunt for a different payee and a different *cestui que trust* from that mentioned in the instrument.

We are therefore of the opinion that the note and deed of trust are inoperative and void as against the complainant, and that he is entitled to the relief asked. The decree of the Chancellor is accordingly reversed, and a decree directed in pursuance of this opinion.

GRAHAM vs. THE STATE.

An indictment for usury averring a loan of money is supported by evidence of a loan of bank paper.

Graham was indicted in the Circuit Court of Jefferson county. The indictment charges, that "on the 11th day of February, 1843, in the county of Jefferson, William Graham, laborer, unlawfully did reserve, exact, secure and take from one Josiah Denton a larger and greater sum than six *per centum per annum* for the loan, use and forbearance of one hundred dollars, to wit, at the rate of twenty *per centum per annum*, to the evil example," &c. &c.

The defendant pleaded not guilty, and the case was tried by Judge R. M. Anderson and a jury, at the December term, 1843.

It appeared in evidence, that Denton got from the defendant notes of the Bank of the United States and silver, of the amount of 100 dollars, and that it was received as money on loan for 12 months, and that Denton gave Graham his note for one hundred and twenty dollars, due 12 months after date. The prosecutor, Denton, paid Graham several sums on this note at different times. The court charged the jury, that if the notes of the Bank of the United States were estimated as gold and silver by the parties to the contract of loan, there would be no variance, and the proof in that respect would sustain the allegation of a loan of money. The jury found the defendant guilty as charged, and under the provisions of the act of 1835, ch. 50, ascertained that the defendant had received of the prosecutor the sum of \$53 95 usury. The defendant moved the court for a new trial. This motion was overruled and judgment rendered against the defendant on the verdict.

The defendant appealed.

Peck, for the plaintiff in error. There is a variance between the indictment and the proof. See 5 Yerger, 160; Martin & Yerger, 129.

Attorney General, for the State.

[Graham vs. The State.]

TURLEY, J. delivered the opinion of the court.

William Graham was convicted of the offence of usury at the December term, 1843, of the Circuit Court for the county of Jefferson. The bill of indictment charges, that he "unlawfully did reserve, exact, receive and take from Josiah Denton a larger and greater sum than six *per centum per annum*, for the loan, use and forbearance of one hundred dollars, to wit, at the rate of twenty *per centum per annum*, for the loan, use and forbearance of one hundred dollars." The proof on the trial showed, that part of the one hundred dollars loaned was silver and part U. S. Bank paper; for which reason defendant moved for a new trial, alledging that dollars, the word used in the indictment, means money; that U. S. Bank paper is not money, and that therefore the charge in the indictment is not sustained by the proof.

The motion for a new trial was overruled by the court, and we think correctly. The court at the present term determined, in the case of *Crutchfield vs. Robbins, Tingley & Co.* that the word money is a generic term, and covers every thing used by common consent as a representation of property, and passing currently from hand to hand as money, whether it be coin or paper. This we consider as settling the question in controversy in the present case; for bank paper is money when passed and received as such; and moreover, the word dollars does not of necessity mean coin, for in common parlance there are paper dollars as well as silver dollars, and the word in that sense applies as well to the one as the other. United States Bank paper is payable in dollars, it passed as dollars, was lent and received in the present case as so many dollars, and the indictment, charging it as one hundred dollars, is supported by the proof that it was U. S. Bank paper for that amount.

Judgment affirmed.

NOTE.—See 6 Term, 268; 5 Term, 531; 3 Bos. & P. 343; Bacon, tit. *Usury*.

DAVIS & WIGGINS vs. WILLIAMS.

The fact that a settler in the Ocoee District had secured an occupancy under the act of 1837, ch. 11, did not prevent him from securing another, under the act of 1839, ch. 8.

This is an action of ejectment instituted in the Circuit Court of Polk, by Williams against Davis, tenant in possession of land claimed by Wiggins. Wiggins was made a party. It came on to be tried, on the plea of not guilty, at the October term, 1843, and was tried by Judge Keith and a jury.

The plaintiff exhibited a probate of occupancy of land lying in the Ocoee district, made on the 3d February, by Balch, assignments to himself, an entry made on 27th May, 1841, and proved the possession of Davis.

The defendant exhibited a probate of occupancy, dated 31st May, 1841, an entry on 1st June, 1841, and a grant of the date of 9th August, 1841, for the land granted to Williams as above stated.

It appeared, that Balch, the settler of the occupancy, had made probate of an occupancy under the act of 1837, and defendant insisted before the jury, that having availed himself of the act of 1837 to secure an occupant right, his probate of occupancy under the act of 1839 was void.

Judge Keith, however, was of a different opinion, and so charged the jury, who rendered a verdict in favor of the plaintiff. A motion for a new trial was made and overruled, and defendants appealed.

Van Dyke, for plaintiffs in error.

Murray, for defendant in error.

GREEN, J. delivered the opinion of the court.

The only question in this case is, whether a party who may have availed himself of an occupant preference in the Ocoee district under the act of 1837, is authorized by the act of 1839, if he were in possession of other vacant land at the passage of said act, to have a preference or priority of entry of such land so possessed.

[*Davis & Wiggins vs. Williams.*]

The Circuit Judge told the jury, that such preference would exist, and we think rightly.

By the 5th section of the act of 1837, ch. 11, a preference of entry is allowed to any person, except a Cherokee Indian, who was in the actual possession of any vacant and unappropriated land in said district at the time of the passage of the act.

The act of 1839, ch. 8, was passed to amend the act of 1837, ch. 11; but it provides, that every person in the actual possession of any vacant and unappropriated land in the Ocoee district, shall, from and after the passage of the act, be entitled to a preference of entry at such prices and at such times, and with such other benefits and under such other restrictions, as are prescribed by the act of 1837. The right to an occupancy conferred by this act, is not, by its provisions, nor by any fair inference, made to depend upon the fact, that the occupant had enjoyed no similar benefit under the act of 1837. The right is conferred, without qualification, upon every person who should be in the possession of vacant land, at the time of its passage; but that right is to be enjoyed subject to the restrictions which are prescribed by the act of 1837, in relation to occupant rights under that act.

The restrictions in the act of 1837 do not prohibit a party from a right of occupancy, should he have enjoyed that benefit under the provisions of some prior act. If it did, then the argument for the plaintiff in error would be sound; for the act of 1839 imposes such restrictions, and such only, as are prescribed in the act of 1837. The act of 1837 prohibits a party from proving more than one occupant right, and this restriction exists in the act of 1839; but as this restriction, by the act of 1839, applies only to occupant rights acquired under *that act*, so in the act of 1839 it is confined to rights acquired by the fact of possession at the date of its passage.

We think there is no error in the judgment, and order that it be affirmed.

GILLET & FRANKLIN vs. ROADMAN.

By the practice in this State, a judgment is given generally for costs. The costs are fixed by law, and when taxed by the clerk and the amount ascertained, the judgment rendered is a judgment for that amount.

This suit by *scire facias* was tried before Judge R. M. Anderson, at the July term, 1843, at the Circuit Court of Cocke county, and a verdict and judgment rendered for the plaintiffs. The defendant appealed.

T. Arnold and *Peck*, for the plaintiff in error.

Hynds and *R. J. McKinney*, for defendants in error.

GREEN, J. delivered the opinion of the court.

This is a suit by *scire facias* for costs. The plaintiffs in error were sureties for Wm. C. Story, for costs in an action of ejectment, which the defendant in error prosecuted against said Story. Story was convicted in said suit, and an execution was issued against him for damages and costs, and returned "no property found," whereupon this *scire facias* was sued out.

In reciting the judgment in the action of ejectment, the *scire facias* sets out, that "afterwards, at the March term, 1842, of the Circuit Court, the said Wm. C. Story failed to defend the said suit, and the said Wm. C. Roadman recovered a judgment against him, the said Wm. C. Story, for the sum of one hundred and forty-three dollars and thirty-eight cents, for his damages and costs," &c.

To this *sci. fa.* the plaintiffs in error pleaded *nul tiel record*.

The exemplification of the record, offered in evidence, contains a judgment in the following words: "It is considered by the court, that the plaintiff recover his term yet to come in and to the premises in the declaration mentioned, and his damages assessed by the jury in the form aforesaid, together with the costs in this behalf expended." Then follows the clerk's taxation of costs, amounting, with the damages, to the sum mentioned in the *scire facias*. It is contended, that there is a vari-

[Gillet & Franklin vs. Roadman.]

ance between the judgment set out in the *scire facias*, and the one offered in evidence; for that the record does not show a judgment for \$143 38 cents for damages and costs, but a judgment for the damages found by the jury, and the costs expended, leaving the amount undetermined and to be ascertained by the clerk. We think this record *does* show a judgment for \$143 38 cents, costs and damages. It is true, the amount of the costs was not ascertained before the judgment was rendered, and by the court stated and set out in the judgment; nor has this ever been the practice in this State. A judgment is rendered for the costs generally, which is a recovery of all costs that have by law accrued. True, the taxation of costs is under the supervision of the court; and there is not, by the judgment, a recovery of any item of costs that has not been legally taxed. But when the costs are legally taxed and the amount ascertained, the judgment for costs is a judgment for that amount. If this were not so, how could an execution issue for costs? It can only issue upon a judgment and for the sum recovered by that judgment.

There is no error in the record, and the judgment will be affirmed.

NOTE—"It was anciently the practice, for the court or one of the judges to tax the costs, and make a special rule for their payment, upon service of which and refusal of payment an attachment issued. But at this day, costs are taxed in the King's Bench by the master and in the Common Pleas by one of the prothonotaries upon the attorneys or agents of the parties attending at their respective offices for that purpose. After the taxation, the master or prothonotary marks the amount of the costs on the *postea inquisition* or *demurrer-roll*, as the case may be, *when final judgment is said to be signed*," 1 Petersdorff, 20.

A judgment for costs generally includes all the costs belonging to the suit, whether prior or subsequent to the rendition of the judgment. If new costs accrue, the judgment opens to receive them. Peter's Con. S. C. Rep. 464.

SMITH vs. WHITE.

A party is entitled to a writ of *certiorari* where he failed to give an appeal bond within the two days prescribed by statute, in consequence of a remark of the Justice of the Peace before whom the case was tried, that it could be done at a later period.

White recovered judgment against Smith before a Justice of the Peace of Claiborne. Smith prayed an appeal, which was granted on condition that bond was given. No bond was given within two days after the rendition of the judgment, in consequence of a remark of the Justice, that bond could be given at some future day. The Justice subsequently refused to take the bond or grant the appeal.

Smith obtained a writ of *certiorari*, which at a subsequent period was on motion dismissed. Smith appealed.

The records do not show that any person appeared for Smith.

John A. McKinney, for White.

TURLEY, J. delivered the opinion of the court.

Hugh White sued James Smith before a Justice of the Peace, and recovered judgment. Smith prayed an appeal on the day of trial, which was granted, upon his giving bond and security. This was not done at the time; but subsequently, viz, on the 2d day after the trial, he went to the Justice for the purpose of doing so, but met him going to church: he informed him of his business, and observed that if it would answer as well, he would attend and give the bond on the Monday following, it then being Saturday. To this the Justice replied, "well." On the Monday following the Justice refused to receive the bond, alledging that it had not been tendered in time. Thereupon Smith filed a petition for a *certiorari*, in which a good legal defence to the action is shown, and the facts above stated are set forth as a reason for not having appealed. This petition was dismissed by the Circuit Court, to reverse which judgment this writ of error is prosecuted. We are of the opinion, that the judgment of the Circuit Court, dismissing the petition, is erroneous. We think the reason assigned for not giving the bond

[Hunter vs. Bryan et als.]

on Saturday the second day after the rendition of the judgment is sufficient; that the remark of the Justice induced the petitioner to believe that it could be as well done on Monday, and that but for this the bond would have been executed on Saturday. The design of courts of law is to administer justice. Here is a case in which it appears that petitioner has a good legal defence, of which he is sought to be deprived by reason of a mere oversight, superinduced by the conduct of the Justice of the Peace who gave the judgment. This we cannot permit.

Let the judgment be reversed, and this case be remanded for a trial upon its merits.

NOTE.—See 4 Yerger, 180; 4 Hayw. 100; 3 Hum. 145, 137; 2 Hum. 32.

HUNTER vs. BRYAN et als.

To create an estate in fee simple, the land must be conveyed to the purchaser and *his heirs*. Where it is conveyed to the purchaser alone, a life estate alone is created.

Catharine Hunter, the widow of Thomas Hunter deceased, filed this bill in the Chancery Court of Greenville, in 1843, against Mary Bryan and others, the heirs of John Hunter, and also against the heirs of her deceased husband, to have dower decreed her.

The bill charges, that on the 8th day of January, 1813, John Hunter, by deed, conveyed to his son Thomas Hunter, a tract of land, lying in Green county; that Thomas Hunter continued in uninterrupted possession of said land till his death, in 1842; that since that period she and her children had remained in possession of it, and that during this entire period the possession had been held adversely. The bill also charged, that the heirs of John Hunter set up a claim to the land on the ground, that John Hunter conveyed by the terms of the deed only a life estate to Thomas Hunter.

The bill made an exhibit of the deed, by which it appeared that John Hunter "released all his right, title, claim and interest to Thomas Hunter."

[Hunter *vs.* Bryan et al.]

The defendants demurred to the bill, and after the argument of the demurrer, the Chancellor sustained the demurrer and dismissed the bill.

The complainant appealed.

T. A. R. Nelson, for complainant.

R. J. McKinney & Sneed, for defendant.

TURLEY, J. delivered the opinion of the court.

On the 8th day of January, 1813, John Hunter executed a written instrument, under seal, in the words following:

"Know all men by these presents, that I, John Hunter, Sr., of the county of Green, State of Tennessee, do release all my right, title and claim in and to a tract of land to Thomas Hunter, of the county aforesaid; the land lying and being on Grassy creek, in the county of Green, for a sum to me in hand paid; the land on which I live, two hundred acres."

Thomas Hunter took possession of the land and resided upon it till his death, which event took place some thirty years afterwards, as the bill alleges. Upon his death his widow, complainant, files her bill for dower in the premises, and the question presented is, what estate did her husband take under the conveyance from John Hunter, Sr.; and we are constrained by long and well settled principles, to hold it to be an estate for life only. In the 1st vol. of his *Treatise upon Tenures*, Littleton says, that "to create an estate in fee simple, the land must be conveyed to the purchaser and his heirs." This as a rule of property, although of feudal origin, has been invariably enforced, and we have no power to change it. Thomas Hunter, then being only seized and possessed of an estate for life, there is nothing out of which his widow is endowable, and the decree of the Chancellor must be affirmed.

NOTE.—See 4 Kent, 4, 5.

SWEAT et al. vs. HENSON.

Where the consideration was paid by one alone of the joint purchasers of real estate, upon a decree of sale of the interest of the other purchaser at the instance of judgment creditors, it is held, that he who paid the purchase money had a right first to be satisfied out of the proceeds of the sale.

This bill was filed by Sweat and others, judgment creditors of William Henson, in the Chancery Court at Pikeville, against William and John Henson, to obtain a decree for a sale of 500 acres of land, lying in Bledsoe county, for the satisfaction of their judgments.

William and John Henson purchased the land jointly, and a bond was taken for title to them jointly, and they took possession. John Henson paid most of the consideration, and took a deed to himself from the vendor; and executions having been returned nothing found on the judgments of said creditors, this bill was filed against the Hensons to subject William's interest to sale.

The case came on and was tried on bill, answer, replication and proof, at the September term, 1843, by Chancellor Ridley. He decreed a sale of the land, and directed the proceeds to be appropriated, first to the satisfaction of judgment creditors, and secondly, to reimburse the money advanced by John in discharge of that portion of the consideration money due vendor by William Henson. John Henson appealed.

Thompson, for the complainant.

Whitesides, for the defendants.

REESE, J. delivered the opinion of the court.

The complainants are the creditors of William Henson, and filed this bill to subject his equitable interest in a tract of land purchased by John Henson and the said William, from McIver. The purchase at the time it took place was a joint one, and each was to pay one half of the price. A bond to convey the land was given to them by the vendor; and John and William entered into possession of the land under their equitable title,

[Galbrath vs. Martin & Findley.]

and took possession of it severally, each of his own portion, having made a parol partition and a division line between them, and their possessions thus continued. John Henson having paid much the larger portion of the consideration, took a deed of conveyance to himself alone for the entire tract from the attorney of McIver, either for his indemnity, or because he wished to become owner of the entire tract.

An account has been taken of the claims of the complainants, and of the excess of the payment of the price by John Henson, and the Chancellor decreed that William's equitable title in the moiety of the tract possessed by him should be sold, and the proceeds be applied, first to satisfy the claim of the complainants, the creditors of William, and then to the defendant, John Henson, for his claim, for having bought and paid for the land of William. This priority is clearly wrong. The priority in justice and reason is obviously the other way. The legal title is in John Henson, and to divest that without refunding the consideration, would be quite as unjust as to sell any of his other property to pay the debt of his brother William Henson.

The priorities of the Chancellor's decree must be exactly reversed; and for that purpose, and to that extent the decree is hereby reversed.

GALBRATH vs. MARTIN & FINDLEY.

1. The fact that the second endorser received half of the proceeds of a discounted note by previous agreement, is a good defence to that extent in law or equity, for the first against the second endorser.
2. Where a defence may be made, either in law or equity, and in the suit at law the defendant does not make it, he loses his right to enforce his defence in equity; yet if the defendant in equity does not object to the want of jurisdiction, but answers over to the merits, he waives the objection, and the court will act on the defence.

This bill was filed by Galbrath against Findley and Martin to enjoin a judgment obtained by Findley against complainant.

Martin executed a note to Galbrath for \$100, Galbrath endorsed it to Findley, and Findley endorsed it to the State Bank at Rogersville. The bank discounted it, and the pro-

[Galbrath vs. Martin & Findley.]

ceeds of the note, as by previous agreement, was divided between Findley and Martin. The note was protested for non-payment, and taken up by Findley, who instituted a suit against Galbrath, first endorser, and recovered a judgment against him in the Circuit Court of Hawkins, for the whole amount. Galbrath did not urge at law the defence, that Findley received a part of the money by agreement made before hand, but filed this bill for that purpose.

The defendants Findley and Martin filed their answers, both denying that Findley received any portion of the proceeds of the note, but did not object on the ground of a want of jurisdiction.

The case was tried by Chancellor Ridley, on bill, answers, replications and proof. He being of opinion from the proof, that the note was discounted for the joint benefit of Findley and Martin, and that they divided the proceeds, ordered a decree to be entered, perpetually enjoining the one-half of the judgment.

The defendants appealed.

R. J. McKinney, for the complainant.

J. A. McKinney, for the defendants.

TURLEY, J. delivered the opinion of the court.

J. W. Martin drew a note payable to **A. L. Galbrath**, the complainant, at the branch of the Bank of Tennessee, at Rogersville. This note Galbrath endorsed to **John B. Findley**, and **John B. Findley** to the bank. Galbrath was an accommodation endorser, having no interest whatever in the note, and having received no benefit from it. At the maturity of the note it was protested for non-payment and taken up by **John B. Findley**, the second endorser, who thereupon instituted a suit at law against the complainant Galbrath, the first endorser, and recovered judgment for the amount of the note with interest and cost, and thereupon he files his bill of complaint, alleging that the note was made for the mutual benefit of Martin the drawer

[Galbreth vs. Martin & Findley.]

and Findley the second endorser, who upon its being discounted received one-half the money; and prays that he, Findley, be enjoined from enforcing the judgment at law.

We are of the opinion that the proof establishes the fact, that the note was discounted for the mutual benefit of the drawer, and Findley the second endorser, and that he received one-half of the proceeds: this unquestionably constitutes a good defence for so much of the note in favor of the complainant. But it is contended that this is a legal as well as an equitable defence, and that in as much as the complainant permitted the judgment to be rendered at law without making it, he is prevented thereby from making it in equity. It is now well settled, that if a defendant at law neglect to avail himself of a defence, which might be there made, he cannot be permitted to make it in equity, and this whether the defence were purely legal or from its nature both legal and equitable. But there is this difference between the two classes of defences. If the defence be purely legal, it is not under any circumstances a fit subject for chancery investigation, and therefore no neglect on the part of defendant in chancery in insisting on the want of jurisdiction will prevent his availing himself of it upon the hearing; or in other words neglecting to demur and answering over upon the merits will not in such case give jurisdiction: but if the defence be legal and equitable, that is, a defence which might have been made either in law or equity, it is a fit subject for chancery investigation, and which is only ousted by reason of a failure in having made the defence at law where it might have been legitimately made. But in cases of this kind if the defendant in equity neglect to object to the want of jurisdiction on this ground and answers over upon the merits, he waives the objection by his own act, and will not be permitted to insist on it.

We are, therefore, of the opinion, that the complainant is entitled to the relief granted him against one-half of the note, and affirm the decision of the Chancellor.

HANSARD *et als.* vs. BANK OF TENNESSEE.

A delivery of a refunding bond to a Clerk of the Chancery Court in the street, is a good delivery. It is not necessary to its validity that it should have been delivered in his office, or that all the signers should have been present at its delivery, or acknowledged it before him at any time.

The Bank of Tennessee recovered a judgment against Hansard, Hodges and Garrett, in the Circuit Court of Claiborne county. *Fi. fa.* issued, which was superseded by order from Judge Anderson, on the petition of defendants, and jury was empannelled to try the questions involved. It appeared that the defendants had obtained an injunction against the enforcement of the judgment from the Chancery Court; that upon the coming in of the answer of the Bank the injunction was dissolved upon condition, that the Bank should give a bond to refund in the event the Bank should prove unsuccessful in the suit in chancery. The petition for the *supersedeas* alleged that no such bond had been *executed* and *acknowledged* before the Clerk of the Chancery Court. It appeared that the Clerk had taken in the streets a bond in the common and proper form, signed by the defendants. The sureties were not present at any time before the Clerk. A copy of this bond was not lodged with the Clerk of the Circuit Court before the *fi. fa.* issued. The bond was handed to the Clerk by one of the defendants, and the Clerk looked at it and knew the signatures to be those of the obligors.

The Judge charged the jury, that if a bond be signed by several and delivered to one of the signers to be delivered to the obligee and it is delivered by him, the bond is delivered as to all, and was valid as to all.

The jury returned a verdict, that the bond in question had been executed and delivered according to the decree of the Chancery Court.

The Judge thereupon discharged the *supersedeas* and dismissed the petition.

The defendants appealed.

Peck, for Hansard *et als.*

S. R. Rodgers, for the Bank.

[Hansard et al. vs. Bank of Tennessee.]

TURLEY, J. delivered the opinion of the court.

The plaintiffs in error being debtors to the Bank of Tennessee, judgment at law was rendered against them, which was enjoined in Chancery. The injunction was dissolved upon answer, on condition that a refunding bond should be executed. This was done, in proper form, and the bond handed to the Clerk of the Chancery Court, in the street, who received it without objection. It was never acknowledged before him by the parties, but he says that he is acquainted with the hand writing of the obligors, and knows the bond to have been executed by them. Thereupon execution was issued on the judgment at law, which was superseded by the plaintiffs, upon the alledged ground that no bond had been given as was required by the decree dissolving the injunction, and the question is, is the bond as proven to have been executed, a good bond. The Circuit Judge held that it was, and we think correctly. There is no particular manner prescribed in which such bonds shall be executed. It is true, that it is the duty of the Clerk to judge of the sufficiency of the bonds, and of the fact of its having been executed by the obligors, and therefore if in his estimation the bond be not of adequate amount, or of adequate solvency, or if he do not know that it has been signed by the obligors, it is his duty not to receive it. But in this case there is no objection to the adequacy of the amount, or the solvency, and the Clerk was satisfied of the genuineness of the bond from his acquaintance with the hand writing of the parties and therefore required no acknowledgement of its execution; and a delivery to him in the street was as good as if it had been to him in his office, he not objecting.

We are, therefore, of opinion, that the execution was legally issued, and affirm the judgment of the Circuit Court.

THE STATE vs. WOODSON.

An indictment for selling by false weights must specify the person to whom the sale was made. It is not sufficient to charge, that defendant sold to "divers persons."

This indictment was returned against Woodson by the grand jury of Claiborne county. The defendant demurred, and the demurrer was sustained by the presiding Judge, R. M. Anderson, and the Attorney for the State appealed.

The *Attorney General* submitted the case to the court.

J. A. McKinney, for the defendant.

GREEN, J.- delivered the opinion of the court.

This is an indictment for selling with false weights. The indictment charges, that defendant being an iron master, kept "certain false weights for weighing iron, goods, wares and merchandise by him sold in the way of his trade." "And the defendant well knowing said weights to be false, did wilfully, falsely and fraudulently sell to divers persons iron, goods, wares and merchandise which, by reason of having been weighed with said false weights, were very much deficient and short of the true and just weight." To this indictment the defendant demurred; which demurrer was sustained by the court, and the Attorney General, on behalf of the State, appealed to this court.

The indictment in this case does not charge, that the goods were sold to any particular person, but states that they were sold to "divers persons." This we think too vague and indefinite in a criminal charge. The party ought to be notified by the indictment of the transaction in relation to which he is called on to defend himself.

Whether a party would be indictable for selling by other false weights than those mentioned in the statute, and consequently, whether the particular false weight used in the fraudulent sale should not be described and set forth in the indictment, it is not necessary to decide.

Affirm the judgment.

POLLARD vs. THOMASON.

1. In an action for the sale of a horse contrary to the provisions of the act of 1833, ch. 80, the declaration must aver that the plaintiff is the head of a family.
2. Where an allegation is necessary in a declaration to maintain an action, its omission in the declaration cannot be supplied by the proof.

This was an action of trover by Pollard against Thomason, Sheriff of Grainger county, for the seizure and sale of a horse by *fi. fa.* against said Pollard. The declaration did not aver that plaintiff was the head of a family. The defendant pleaded not guilty, and at the trial it appeared that Pollard had but one horse, and no mule or yoke of oxen; that he was engaged in agriculture, and was the head of a family, and that the horse was worth \$30.

The presiding Judge, Robert M. Anderson, charged the jury, that in an action under this statute it was necessary to aver that plaintiff was the head of a family as directed by the 5th section of the act, and that not being averred in the declaration, no proof could supply its omission, and that all proof to that point was inadmissible.

The jury rendered a verdict for the defendant. The plaintiff appealed.

Peck, for the plaintiff in error.

J. A. McKinney & J. Netherland, for the defendant in error.

REESE, J. delivered the opinion of the court.

This is an action for selling the horse of the plaintiff contrary to the provisions of the act of 1833, ch. 80, sec. 5. The declaration does not alledge that plaintiff is the head of a family; and the court charged, that the jury would not regard any proof they might have heard on that point in the absence of any such allegation. This is assigned for error. If the declaration be necessary to maintain the action, its omission in the declaration cannot be supplied by the proof. If it was not necessary, no injury was done by the charge. But we think it ~~was~~ necessary. It was incumbent on the plaintiff in such a case, to make

[Hunter & Baker vs. Agee.]

it appear in his declaration and proof, that his condition and attitude placed him within the provisions of the act of assembly. If he were not the head of a family, the act of assembly had nothing to do with him. Aside from this point, the proof in the bill of exceptions shows that the plaintiff was not entitled to a verdict.

Affirm the judgment.

not

HUNTER & BAKER vs. AGEE.

1. A bond given to an officer to procure him to do an illegal act, and to indemnify him against the consequences thereof, is void if its illegality were unknown to the officer at the time of the execution of said bond: *secus* if it were known.
2. A bond given to an officer after the commission of a misdemeanor to indemnify him against the consequences thereof, is valid.

T. A. R. Nelson & R. J. McKinney, for the plaintiffs in error.

J. A. McKinney & Rodgers, for the defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action brought by Agee, on a bond executed by Baker and Hunter, to indemnify him against any damages, that he might be put to, for selling a horse, saddle and blanket, which he, as constable, had levied on as the property of Eli Wilson, by virtue of an execution in his hands, in favor of James Baker against said Wilson.

The defendant pleaded that Wilson was the head of a family, engaged in agriculture, and was the owner of one horse, used in agriculture, and was not the owner of any other horse, mule or yoke of oxen; which horse was, by a statute of Tennessee, exempt from execution, and which said horse had been levied on by said plaintiff, as constable, in violation of his duty, and the laws of the land; and for the foregoing consideration, and none other, the said defendants executed and delivered the said writing declared on to satisfy all damages, cost and expenses

[*Hunter & Baker vs. Agee.*]

that said plaintiff might be put to, provided suit should be brought against him for selling said horse. And so said writing obligatory is void, having been executed to said plaintiff, to indemnify against the violation of law, and a misdemeanor in office by him committed. To this plea there was a replication, to which the defendant rejoined, and the plaintiff demurred. It is unnecessary to notice the replication or rejoinder, as they are both defective. The demurrer reaching back to the first fault in pleading, the question is whether the plea is a good defence to this action.

In the case of *The State vs. Haggard*, (1 Hump. R. 390,) this court decided, that an officer was guilty of a misdemeanor, and indictable for seizing the only farm horse of a defendant in an execution, the same being exempt from execution by the act of 1833, ch. 80, and made a misdemeanor by the act of 1820, ch. 11, (Car. & Nic. 533-4-5,) and in the case of *Baker and Hunter vs. Agee*, (2 Hump. R. 13,) it was held that a bond to indemnify a sheriff or constable for such seizure, is not within the provisions of the act of 1825, ch. 40, (Car. & Nic. 183,) therefore, the question is whether, upon common law principles, the facts stated in this plea make the contract void.

It is certainly true, that when a contract is entered into with a view to violate a statute, or to do an act which is *contra bonos mores*, or against public policy, is void, and no recovery can be had. But if a party undertake to do an illegal act, but does not know at the time that he is committing a trespass, the promise to indemnify him, is valid. *Coventry vs. Barton*, 17 John. R. 142: Comyn on Contracts 27.

In this case, the plea does not state that Agee, the officer, knew that the horse levied on, was the only horse owned by Wilson. He may have believed that the defendant in that execution had other horses than the one levied on, for aught that appears in this plea.

2. But this bond was executed after the seizure of the horse, and to indemnify against damages resulting from the sale only. Now the misdemeanor consists in the seizure, and not in the sale. The proceeds of the sale were received by Baker and Hunter's promise subsequently made, in consideration thereof,

[Smith vs. Crosswhite.]

to indemnify for an illegal act already performed, is binding. Chitty on Contracts, 221, note 1: Mod. 93, 203: 1 Cains R. 460: 14 John. 380: 6 Mod. 225.

Upon either of these points, therefore, the law is for the plaintiff below, and the demurrer was properly sustained.

Affirm the judgment.

SMITH vs. CROSSWHITE.

In an action on an award any material variance between the terms of the submission averred in the declaration, and that offered in proof, will be fatal; *ex. gr.*, where the declaration averred an agreement to abide by and perform the award, and the proof showed an agreement, that the award should be made the judgment of the court.

Crosswhite sued Smith in the Circuit Court of Campbell county, by action on the case upon an award. The defendant pleaded:

1st. That he did not submit the matter in controversy as averred in the plaintiff's declaration.

2nd. That there never had been any full, final and legal award of the matter in suit between the parties.

An issue on these pleas was tried by Judge Cannon and a jury of Campbell county, at the September term, 1844, and a verdict was rendered in favor of the plaintiff for the sum of \$153. A motion for a new trial was made and overruled, and defendant appealed.

J. A. McKinney, for plaintiff in error.

S. R. Rodgers, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action upon an award. The plaintiff's declaration alleges, that certain differences existed between the plaintiff and defendant; and that they mutually submitted to the award of Levy Lacy, John Sharp, and Isaac C. Petree, to be

[Smith vs. Crosswhite.]

made between them, of and concerning the said differences; whose award they agreed to observe and perform: and the said arbitrators made, in writing, an award between the parties, by which it was adjudged that Smith should pay to Crosswhite \$153 18 $\frac{3}{4}$, yet said Smith refused to pay said sum. To this declaration the defendant pleaded:

1st. That he never did make such a submission as that set out in the declaration.

2nd. That no full, final and legal award was made.

On the trial the plaintiff obtained a verdict and judgment, and the defendant appealed to this court.

The bill of exceptions shows, that the only evidence of a submission which was before the jury, was a copy of an order of the Circuit Court of Campbell county, made at its January term, 1841, in two cases then depending in said court between these parties: in the one Smith was plaintiff and Crosswhite defendant, and in the other Crosswhite was plaintiff and Smith was defendant, which order is as follows:

"This day came the parties in proper person into court, and agree that the matter in controversy and dispute in these two suits be referred to the arbitrament and final award of Levi Lacy, John Sharp, and Isaac C. Petree, or that of a majority of them, whose award, to be returned to our next Circuit Court, is to be made the judgment of the court in these two causes."

In pursuance of the submission the arbitrators made the following award:

"Whereas, by an order of the Circuit Court of Campbell county, at the January term, 1841, certain cases therein depending between James Smith and Wm. Crosswhite was referred to us to be arbitrated and decided, and in compliance with said order, and at the request of said parties, we have met at the house of John Sharp, on the first Monday in May, 1841, to perform the duties assigned us, and after hearing the allegations and proof of the parties, both being present, and fully considering, and well understanding the matter submitted to us, do decide and award, that James Smith pay William Crosswhite one hundred and fifty-three dollars eighteen and three-fourth cents, and that said Smith pay the costs of his suit, and

[Smith vs. Crosswhite.]

Crosswhite the costs of his suit; the parties jointly, James Smith and William Crosswhite, pay the costs of the arbitrators. We the arbitrators served five days at two dollars per day each.

I. C. PETREE, [Seal.]

JOHN SHARP, [Seal.]

LEVI LACY, [Seal.]”

This award was returned to court at January term, 1842, and on exceptions being taken thereto, was set aside. Whereupon this suit was brought. Upon these facts several questions now arise and have been debated here.

1. Does the evidence show, that such submission as the one set out in the declaration was made by the parties?

We think it does not. The variance between the submission stated in the declaration and that offered in the evidence is very material. By the submission proved, the parties agreed that all matters in dispute in the two suits then pending should be submitted to the decision of the arbitrators, and that their award should be the judgment of the court. In the declaration it is alledged, that certain differences existed between the parties, and to put an end to said differences, it was agreed to submit them to the award of the arbitrators, and that the defendant, Smith, undertook to observe and perform the award.

The submission proved, was made of record, by order of the court, and stipulates that the award is to be the judgment of the court; the design being to put an end to those suits, and prevent further litigation. But according to the submission stated in the declaration, a right of action only would exist to enforce the award. Instead of putting an end to litigation, it would only increase it. We think, therefore, there is a fatal variance between the declaration and the evidence in the cause, and that no recovery can be had in an independent suit upon the submission and award set out in the record. Crosswhite should have insisted on his award in the suits in which it was made; and when it was set aside, exception should have been taken, setting out the award, and making it part of the record.

Reverse the judgment, and remand the cause to the Circuit Court of Campbell county for another trial to be had therein.

MOSIER *Adm'r.* vs. ZIMMERMAN.

1. A judgment by default or false plea against an administrator, is an admission of assets at common law, which cannot afterwards be denied.
2. But now by statutes of Tennessee the administrator may at any time before his personal liability is fixed by a judgment against him individually, enjoin all judgments against him as administrator, and have a *pro rata* distribution of the assets of the estate if it be insolvent.

This is a writ of *scire facias*, which was issued from the Circuit Court Clerk's office of Jefferson county, by Zimmerman against Mosier, to render Mosier responsible in his own right for the amount of a judgment which Zimmerman recovered against him for the sum \$334 25, as administrator of Crouch, deceased. The defendant pleaded two pleas:

1st. That he had not wasted the estate.

2nd. That after the service of the original writ in the case of Zimmerman against defendant as administrator, and during the pending of that action, and before judgment, he filed his bill under the provisions of the acts of assembly, suggesting the insolvency of the estate of Crouch, praying for an equitable distribution of the estate, and obtained an injunction against all creditors.

These pleas were demurred to, and there was a joinder in demurrer. Without any special disposition of this demurrer an agreed case was made up, the material facts of which are, that at the April term, 1841, a judgment by default was taken against Mosier as administrator; that a writ of enquiry of damages was ordered, and on the 20th December, 1841, the jury assessed damages to the amount of \$335, on which a judgment *de bonis testatoris* was rendered. On the same day Mosier filed his bill in Chancery under the statute. On the 24th Judge Anderson ordered an injunction against the judgment of Zimmerman and all others which was issued. In 1842 this *scire facias* issued.

At the August term, 1844, Judge Anderson, "on the case agreed and whole record," rendered a judgment against the defendant *de bonis propriis*, from which he appealed.

Peck, for the plaintiff in error.

[Mosier, adm'r. vs. Zimmerman.

R. J. McKinney, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

From the case agreed it appears that Abraham Zimmerman, at the April term, 1841, obtained a judgment against the plaintiff in error, John W. Mosier, administrator upon the estate of Isaac Crouch, and Allen Crouch, by default. At the December term following a writ of enquiry of damages was executed; and judgment final was rendered against said administrator *de bonis testatoris* for the sum of \$335 75. On the 20th day of December, 1841, John W. Mosier, administrator as aforesaid, filed his bill in Chancery, suggesting the insolvency of his intestate's estate; and on the 24th of the same month obtained an injunction, staying proceedings on the part of the creditors of said estate against the administrator at law. On the 9th day of May, 1842, Zimmerman issued a writ of *scire facias* against said John W. Mosier, administrator, seeking to charge him *de bonis propriis* with payment of the judgment so rendered as aforesaid. Upon the hearing of the case agreed, the Circuit Judge gave judgment against the administrator *de bonis propriis*, to reverse which he prosecutes his writ of error to this court.

That at common law a judgment rendered against an executor or administrator upon a false plea, or by default, was an admission of assets sufficient to satisfy the debt at the time, and that he was estopped thereby from denying the truth of the fact upon the attempt to charge him *de bonis propriis* for a *devastavit*, has been long settled by a train of well considered adjudications. The common law seems to have had a peculiar regard for the vigilant litigant. So much so that the protection extended to him has grown into a maxim, *vigilantibus non dormientibus leges subvenient*. It is not intended to enter into an investigation of the justice of this maxim; let it suffice, that it has not been considered in Courts of Chancery as always an evidence of right, and particularly in the administration of the effects of deceased persons, which that court, whenever it could get jurisdiction, has invariably distributed, not upon that principle, but upon the principle, that all creditors had an equal equity to

[Moeler, adm'r. vs. Zimmerman.]

payment of their debts, and a distribution *pro rata* of the fund when it was not sufficient for all. In furtherance of this view, and to cause this to be the mode of distribution in all insolvent estates, the act of 1833, ch. 36, and of 1838, ch. 111, were passed.

By the 1st section of the act of 1833, it is provided, "That when any estate of any person deceased shall be insolvent, or which may be suggested to the proper authority to be insolvent by any creditor, it shall be the duty of such authority to make an order upon the person to whom administration may be granted, to give notice by advertisement in some newspaper published within this State, and also at the court-house door in the county, for all persons having claims against said estate to appear and file their claims on or against a day fixed by such notice."

The 6th section provides, "That no action brought, judgment, bill single or note of hand, shall have precedence over unliquidated accounts, which shall be presented and filed authenticated as required by the act, but that all such claims be acted upon as being of equal grade."

This act not being found adequate for the carrying into full effect the design intended by it, that of 1838 was passed to supply the defects.

The 1st section of that act provides, that the effects of all insolvent estates shall be distributed among the creditors agreeable to the principles of the act of 1833, that is, without preference.

The 2d section provides for proceedings by Bill in Chancery on the part of the creditor, administrator or executor, and authorises the Chancellor to enjoin all proceedings in the County Court under the provisions of the act of 1833, and also to commencing or prosecuting all suits at law against the estate, and that such bill may be filed at any time after the estate is or shall be reported insolvent to the County Court.

The 5th section provides, that in "no case where an estate shall be ascertained to be insolvent, shall any executor or administrator be rendered personally responsible by reason of any false plea pleaded by him."

[Meier et al. vs. Zimmerman]

These statutes are to receive such construction as will advance the remedy intended by them, and suppress the evil. The evil to be suppressed, was the power given by the law to a vigilant and active creditor to appropriate all the effects of an insolvent estate to his own claim, to the exclusion of other creditors of equal merit, but of less rapaciousness or astuteness, and the remedy is to compel a *pro rata* distribution in such cases.

In order to make this remedy effectual the 6th section of the act of 1833 has destroyed the dignity of claims as recognized by the common law, and put judgments, bills single, notes of hand and unsettled accounts, upon the same footing, requiring that they shall be acted upon as of equal grade. And the 2d section of the act of 1838, has authorized an injunction of all suits against such estate. And the 5th section in making provision for all cases of the character now under consideration, provides, that although judgment may have been rendered against the administrator before the estate has been ascertained to be insolvent; yet he shall not be made liable personally by reason of any false pleading, if the estate be ascertained to be insolvent before such liability is fixed upon him, and the proper steps taken by him under the statutes of 1833 and 1838.

These statutes then, in any point of view in which they may be looked at, have made ample provision for the *pro rata* distribution of the effects of insolvent estates among the creditors, whether they be creditors by judgments against the testator or intestate in his lifetime, or against his executor or administrator after his death, whether by bill or note, or unliquidated accounts; and there is no case in which such creditor can obtain a satisfaction of his entire debt out of the effects of the estate to the injury of other creditors, or out of the effects of the administrator or executor, by charging him *de bonis propriis* for his false pleading; the remedy being effectual to enforce all creditors, of every grade and description, whether claiming by judgments against the deceased or his personal representatives, by bill, bond, note or account, into an equitable settlement in a Court of Chancery, the proper steps being taken therefor.

These steps have been taken by the defendant in the present case; a bill has been filed, and an injunction issued to stay suits

[Williams et al. vs. Tipton et al.]

at law against the estate which he represents; this injunction is operative upon the present suit, and the Circuit Judge erred in giving judgment *de bonis propriis* against the administrator; it is therefore reversed, and the case is remanded to the Circuit Court to abide the proceeding in the Court of Chancery.

WILLIAMS *et al.* vs. TIPTON *et al.*

1. A creditor must establish his claim by judgment before he is in a situation to impeach the validity of a conveyance for fraud. *Chester vs. Greer et al—ante.*
2. Though a surety has a right to bring his principal and the creditor into a Court of Chancery to compel the payment of the debt, yet before loss incurred or payment made, he has no right to come into a Court of Chancery to set aside a fraudulent conveyance on the ground of apprehended loss. See 3 Hump. 543; 1 Story Eq. sec. 327.
3. A judgment creditor has a right in equity to set aside a fraudulent conveyance, and a surety who has satisfied a part of the judgment of such creditor, shall be substituted to the rights of such judgment creditor, to the extent of his payment. 12 Wheat. 557.

This bill was filed in the Chancery Court at Jonesborough, by Williams and Hendricks against Tipton and Johnson, and was tried on bill, answer, replication and proof at the November term, 1843, by Chancellor Ridley. He being of the opinion that plaintiffs were not entitled to the relief prayed dismissed the bill but without prejudice. The complainants appealed.

T. A. R. Nelson, for the complainants.

R. J. McKinney, for the defendants.

RESEB, J. delivered the opinion of the court.

Complainants are the sureties of Tipton, in his official bond as Sheriff of Carter county. Judgments were obtained against them and their principal, on the ground of his defalcations in office, and the land of complainants was sold in satisfaction of said judgments, which the judgment creditors purchased, and which they have since redeemed according to law. Tipton conveyed to Johnson, his son-in-law, a valuable tract of land.

[Williams et al. vs. Tipton et al.]

The complainants alledge, that the conveyance was made to embarrass, hinder and delay the creditors of Tipton; and, as they apprehend that they will be subject to further loss on the ground of their suretyship, they pray that the conveyance from Tipton to Johnson may be set aside as fraudulent, and the land be held liable for any thing further that they may be compelled to pay as sureties for said Tipton. His Honor the Chancellor dismissed the bill of complainants on the ground, that they, not having any judgment against Tipton, were not in a situation to impeach a conveyance voidable under the statute of frauds. We have had occasion more than once, during the present term, to assert the correctness, and apply the principle of this familiar doctrine. The counsel for the complainants, admitting its correctness in general, yet insist that it does not apply to the case of sureties, who, it is said, may at any time come into a Court of Chancery upon a *quia timet* principle, seeking indemnity, before they have been compelled to pay any thing. It is true, that arising from the relation of suretyship, the right does exist in the surety, for his own protection, to bring the principal and the creditor into a Court of Chancery. But that does not touch the present question; which is, whether a surety, before loss incurred or payment made by him, has a right in a Court of Chancery to avoid, as fraudulent, a conveyance of his principal, on the ground that he *fears* he may become the creditor of his principal by being subject to pay. We are of opinion that the surety has no such right. But the Chancellor erred in dismissing the bill; for to the extent to which the complainant has satisfied the judgment of the creditor, he has a right to be substituted to such judgment creditor, and in that character to avoid the conveyance and subject the land to the satisfaction of his demand. It is not questioned upon the facts shown in the record, that the judgment creditor might avoid the conveyance: to the extent of his payments the surety may do the same.

Let an account be taken of the amount of said judgment, which has been satisfied by the complainant, and to that extent the land in question will be subjected to refund such amount, and also to pay the costs of this suit.

HURELL vs. THE STATE.

An indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof.

The defendant was indicted in the Circuit Court of Grainger county, for receiving stolen goods, knowing them to have been stolen. He was found guilty, and a motion in arrest of judgment was made, on the ground that the indictment did not charge that he received the goods with the intent to deprive the owner of them. This motion was overruled and defendant sentenced to confinement in the penitentiary for one year, from which judgment he appealed.

Peck, for plaintiff in error.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

The indictment against the prisoner and others contained two counts: the first charged them with feloniously stealing a log-chain; the second, with having received it knowing it to have been stolen. The prisoner was convicted on the second count. That count sets forth, that the prisoner and the others, "on the 1st day of Sept. &c. in the county of Grainger, &c. one log chain of the value of \$5, of the goods and chattels of one William T. Tate, by a certain evil disposed person to the jurors unknown, then lately before feloniously stolen, taken and carried away, of the said evil disposed person, *feloniously did receive and have*," "they, &c. well knowing the same to have been feloniously stolen, taken and carried away." The 26th sec. of the criminal code provides, that "any person who shall fraudulently receive or buy any goods not exceeding \$10 in value, that shall have been feloniously stolen or taken from another, knowing them to be stolen, *with intent to defraud the true owner thereof*, shall undergo confinement," &c. It will be perceived, that the words, "*feloniously did receive*," are substituted for the words "fraudulently did receive," and that the

[Hurrell vs. The State.]

latter words, "with intent to deprive the true owner thereof," are altogether omitted. Is this a good indictment under the statute? Certainly not. It was early held, with regard to this section of the statute, in the case of *Wright against The State*, 5 Yer. 150, that the words omitted in this indictment are the most material in the statute; for the court in that case say; "the only enquiries under this act are, whether the accused received the goods, knowing them to have been stolen, having at the same time a fraudulent intent to deprive the owner of them." (See also the case of *Fergus vs. The State*, 6 Yerger.) But it is alledged in argument on behalf of the State, that this court, in the case of *Peek vs. The State*, (2 Hum.) held that the indictment, to be good under the statute, need not pursue the very words, but that substituted words of equivalent or more extensive signification would do; and this efficiency is claimed in the present case for the word "feloniously," as predicated of the reception of the goods. The statute uses the words "fraudulently received," &c.; and "feloniously received," according to the case referred to, may well be substituted for them, being of more extensive signification. But will the word "feloniously" not only supply the omission of the word "fraudulently," but the entire and important clause, "with intent to deprive the true owner thereof"? Potent as the words may be in bills of indictment, we are of opinion that it cannot achieve so much. This then is not a good indictment under the statute. But is it good by virtue of the 72d sec. of the act, which declares indictments framed under the common law form good and valid to sustain a conviction under the statute? We think not. The common law form contains the words, "of the said evil disposed person, *unlawfully, unjustly, and for the sake of wicked gain*," &c. "did receive," &c. The words in the common law form, "for the sake of wicked gain," are used instead of the words, "with intent to deprive the true owner thereof." See 3 Chit. Crim. Law, 989. So that this is not a good indictment, either under the statute, or at common law.

The judgment will be affirmed, and the prisoner remanded to the Circuit Court for further proceedings.

SMITH vs. EVANS.

He who avoids an executed contract on the ground of infancy, must refund the consideration received by him.

Samuel Smith was the owner of three hundred and twenty-three acres of land lying in Bledsoe county. He made a will, in which he directed that this land, after his death, should be rented out till his three sons, John, William, and Evander, should arrive at twenty-one years of age, and that it should then be equally divided between them. He died in 1820, having appointed Samuel Terry his executor. Samuel Terry died, and Scot Terry became his executor. In 1828, when John, the eldest, became of age, John, William and Evander, with the approbation of Scot Terry, the executor of the will, made a joint deed of conveyance of the tract devised to them, to Evans, for the sum of eighteen hundred dollars. This deed was duly acknowledged and possession delivered to Evans. The sum of six hundred dollars was paid to John, and two notes of six hundred each were executed and made payable to Scot Terry, as executor of the will of Smith, deceased, one specifying on its face to be for the benefit of William Smith, and the other for the benefit of Evander. The note for the benefit of Evander was made payable five years after date, and bearing legal interest from its date.

Evander Smith having obtained possession of the note before he arrived at the age of 21 years, to wit, in 1839, sold and transferred it to Bridgman, and appropriated the proceeds. Evans paid to Bridgman the amount of the note.

In 1841 E. Smith filed this bill against Evans and Bridgman, to set aside and annul the deed of conveyance, so far as he was concerned, which he had made to Evans, on the ground that he was an infant when he made it.

Evans admitted, in his answer, that he took the deed from Evander Smith, the complainant, at the time when he was under twenty-one years of age, but insisted that it was made with the consent and approbation of his two elder brothers and of Scot Terry, the executor of the will and testamentary guardian of complainant, and that he had paid a full and adequate

[Smith vs. Evans.]

consideration for the land. He further stated, that he had made valuable improvements on the place; and insisted, that in the event the deed of conveyance was set aside, the consideration paid by him to the assignee of complainant with interest, and the value of improvements made, should be refunded.

The case was tried on bill, answer, replication and proof, at the March term, 1844, before Chancellor Ridley.

He declared the deed of conveyance, so far as executed by complainant, void, and directed the consideration money and interest to be refunded, and ordered the clerk to take an account of the rents and profits, the consideration money and interest thereupon, together with the value of the improvements, and report. The complainant appealed.

Thompson, for the complainant. He cited or commented on the following authorities: 1 Story's Eq. Jur. 246, 247; *Richmonds vs. McMinn*, 6 Yerger; *Tucker vs. Mooreland*, 10 Peters's Rep. 59; *Grace vs. Hale*, 2 Hum.

Whitesides, for the defendant. The deeds of infants are not void, but merely voidable, and subject to their election, when they come of age, either to affirm or disavow them. This position is sustained by the case of *Wheaton vs. East*, 5 Yerg. Rep. 41, and authorities there referred to; 10 Peters's Rep. 58; 15 Wend. Rep. 64, 631; 2 Kent's Com. 193, and indeed by all the respectable American and English authorities on the subject running back to the case of *Zouch vs. Parsons*, 3 Burr. 1794.

The contracts of infants are either *executed* or they are *executory*; and those which are executed by passing the infant's interest and vesting it in another for a fair equivalent received are, from their very nature, necessarily voidable merely, and not void. 5 Yerg. Rep. 41.

Whatever may be the rule in executory contracts, it is clear that the executed contract of an infant is voidable only, and only the infant or his legal representatives can avoid it. 1 American Chancery Digest; 2 Hill, 541.

No deed of an infant can at this day be declared void, unless it appear from the face of it that it is manifestly injurious to

[*Smith vs. Evans.*]

him, (except perhaps feoffment to a guardian, feoffment with livery by attorney—account stated—release of debts by infant executor, and a few such specified cases;) and as the deeds in this case were executed by the complainant, and the possession of the land delivered for a full and fair consideration actually paid and so expressed on the face of the deeds; and as they were made jointly with two brothers of the infant who were of lawful age, each conveying a similar interest for a like consideration, it cannot be pretended that they are void on account of being manifestly to the infant's prejudice, nor that they are fraudulent; but must be regarded as fair contracts, freely executed by both parties to them, and at most only voidable at the election of the infant, when of full age, on the ground of infancy alone.

The vendor's infancy at the time he made, and also at the time he acknowledged the execution of these deeds before the clerk, being admitted, and no confirmation by him after coming of age alledged or proved, it may be conceded that the deeds are voidable at his option, and he having elected to disaffirm them, and filed his bill to set them aside, the question, whether or not he shall restore the consideration received by him before he is permitted to disaffirm, or as a consequence of his disaffirmation, is deemed the only material one arising in this case.

What is the effect of the disaffirmance of a voidable, executed contract? Does it enable the infant to retake his property conveyed away by him during minority and to retain the consideration received for it? or does it merely enable him to set aside, when he comes of age, what he chooses to consider an improvident contract made in the heedlessness of youth, and place the parties as they were before the contract was made, each being entitled from the other to the thing with which he had parted?

There is no pretence of actual unfairness in this transaction; and if the contracts be rescinded, it must be, not for inadequacy of consideration, fraud, mental imbecility or any such cause, but alone on the ground of the infancy of the vendor.

Judge Reeve in his learned treatise on Domestic Relations, (243 to 249,) maintains with great ability the doctrine, that

[Smith vs. Evans.]

when an infant avoids, on the ground of infancy, his executory contract to pay money for goods purchased and received by him, the seller may sue for the goods and recover them back; or in other words, that when the infant disaffirms the contract the parties are placed in the position which they occupied before it was made; the infant pays nothing, and the vendor is entitled to his goods. The current of ancient and modern English authority is admitted to be against this doctrine, especially if the defence of infancy be made during minority, as it may be, against the performance of an executory contract. But if after attaining full age the contract is avoided on the plea of infancy, the purchaser being in the actual possession of the goods sold, it may well be doubted whether he would not be liable for a conversion upon a failure to surrender on request; otherwise every thing sold to one under age upon his promise to pay is either voluntarily paid for or absolutely lost to the seller.

A few days before an infant comes of age he purchases a valuable estate on a credit, executes his notes for the purchase money, receives a title and takes possession of the estate. When his notes become due, he then being of age and in actual possession of the estate, avoids the payment of them on the ground that they were executed during his minority. The title has passed from the adult who traded with him, and his contract is binding upon him. He has traded with the infant at his peril and must lose his estate and the consideration promised for it, if the infant choose to have it so. If this be the law in relation to the *executory* contracts of infants it is clearly not the case as to those which are *executed* by them.

If an infant receives rents he cannot demand them again when of age. 2 Kent's Com. 240.

If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. 2 Kent's Com, 240: 8 Cowen's Rep. 84, and authorities there referred to.

In the 3d vol. Stephen's *Nisi Prius* we find the doctrine laid down as follows: "In *Holmes vs. Blogg*, (8 Taunton, 511,) it was held that an infant in avoiding a lease made by him during his infancy, cannot recover back a sum of money which he had

[Smith vs. Evans.]

paid as a premium in consideration of it; Chief Justice Gibbs stating: 'In Lord Chief Justice Wilmot's notes of opinions and judgments, it appears that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the judges, that 'if an infant pays money with his own hand without a valuable consideration he cannot get it back again. Wilmot's notes, 226, n. We therefore think this action cannot be maintained, upon the ground that the infant having paid money with his own hand cannot recover it back again. Note. In *Corpe vs. Overton*, 10 Bing. 256, Chief Justice Tindall said; 'the ground of the judgment in *Holmes vs. Blogg* was, that the infant had received something of value for the money he had paid and that he could not put the defendant in the same position as before.'

"So likewise in *Wilson vs. Kearse*, (Peake's Add. Cases, 196,) Lord King was of the opinion that 'though an infant was not compellable to complete a contract, yet that when he had paid money under it he could not recover it back, unless he could show that fraud had been practised on him.'"

Though the executory contracts of an infant are voidable, yet when he does work, or pays money in performance of his contract, he cannot, by avoiding it, get back his money or recover a compensation for his work. *McCoy vs. Hoffman*, 8 Cowen's Rep. 84.

The executory contracts of an infant are voidable at any time without his restoring or being liable to restore the consideration; but it is otherwise as to contracts executed. On his coming of age and avoiding these, he must restore the consideration. 7 Cowen, 173.

If an infant avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other. 2 Kent's Com. 240; 15 Mass. Rep. 359; 7 Cowen's Rep. 179; 1 N. H. Rep. 73; 6 N. H. Rep. 330; 5 Serg. and Rawl. 309.

Executed contracts can only be avoided after the infant comes of age; but executory contracts may at any time. 7 Cowen, 179.

[Smith vs. Evans.]

A minor, for a fair equivalent, executes his note; which is outstanding against him; when sued on it he may plead infancy and avoid its payment. But if he satisfies the note, the whole current of authorities clearly establishes the doctrine that he cannot recover back his money at all. It is then a contract executed by him and is equally as binding on him, as on the person of age with whom he dealt.

If the law would permit an infant, when he comes of age, to recover back money paid by him for property of which he has had and still enjoys the full benefit, and to retake property sold by him and for which he had been fully paid, it would lead to combinations between guardians and wards, in which the ward would be permitted to sell all his property, pocket the consideration, or divide it with his guardian, and recover his property when of age, and use to his own and his guardian's advantage all property purchased by him, and recover back all the money which he had laid out for it.

Reason, justice and law hold this language in such cases: To the adult they say; "make no trade with a minor by which you involve him in debt, nor with one whom his guardian will not trust with the means to pay you, for in either case you deal at your peril;" and to the infant, when he has made an improvident sale of his property; "this contract shall be set aside if you desire it, but while you ask equity you must do equity; if your property is restored to you you must return what you received for it. It was the duty of your guardian to keep your money and hold possession of your property, and prevent you from parting with them to any one else, until you came of age. If he surrendered them to you during minority he is liable to you when of full age; and he having violated his trust in failing to exercise proper control over you and your effects, and in parting with that which the law requires him to keep and preserve, it is more just that he reimburse your losses if you have sustained any, than that one who has fairly purchased shall not only be required to return the thing purchased, but be visited with the heavy penalty of losing the whole consideration paid by him for it."

[Smith vs. Evans.]

The most diligent guardians cannot prevent infants from making executory contracts, and can upon no principle of justice or law be held responsible for them; nor can their performance be enforced against the minors to their injury. But guardians can prevent infants from executing their contracts by withholding from them the possession of the means of performance; but when they furnish such means they do so at their peril, and it is a sufficient protection to the rights of infants that their guardians are bound to deliver to them on coming of age their money and estates, notwithstanding they may have done so already during the ward's minority.

A guardian cannot take a deed from his ward; and a payment to the ward during minority is no release of the guardian. Can he then surrender to the ward his property and money to convey and deliver to others without being clearly responsible? Certainly not. And is it not better that the ward shall look to him to repair losses resulting from his licensed and improvident dealing, than to a fair purchaser and holder of the property, who finding the ward in possession, having the full, free and uncontrolled use and disposition of his money and estates, yielded to him by his guardian, might be ignorant of his minority, and indeed from the circumstances might infer his full age?

REESE, J. delivered the opinion of the court.

The complainant, in his minority, joined his two elder brothers in the sale of a tract of land and in the conveyance thereof to the defendant Evans, and a note to secure the consideration was given and made payable to one Scot Terry, executor of the will of his father and probably his testamentary guardian, but this latter fact is not shown in the case by record testimony. Terry, during the minority of complainant, handed over to him the note in question, and he was paid the amount due thereon. The deed was acknowledged by the bargainors and was registered, and Evans let into the possession of the land. The contract was fully executed on both sides. The consideration was paid, and adequate, and fairly and fully paid;

[Smith vs. Evans.]

and the concurrence of the elder brothers and of Terry in the sale, leaves the transaction free from all imputation whatever of fraud. Evans sold the land to Bridgman. The complainant, who was a married man, removed to another state. Upon his coming of age, without any confirmation of the sale, or any acquiescence amounting thereto, he filed this bill for the purpose of avoiding and setting aside the deed of conveyance made by him, and being restored to the possession of his land. To this, under the circumstances, he is unquestionably entitled; the counsel for the defendants does not controvert it, and his honor the Chancellor so decreed; but in order to obtain this relief, he decreed also that the complainant must restore the price or consideration. From this decree the complainant has appealed to this court: and the only question here is, whether a complainant who comes into a court of chancery for the purpose of avoiding an executed contract for the sale and conveyance of land, on the ground merely of infancy, when the contract was free from the imputation of fraud or imposition, and the purchaser a stranger in no fiduciary relation to the infant, shall be permitted to do so, and at the same time retain the price, or consideration, for which the conveyance was made. The simple statement of the question carries with it, it seems to us on the most obvious grounds of reason and justice, its own decisive answer. To hold the affirmative of the proposition, would be to do more than protect the infant; it would make him an aggressor upon the rights of others; it would be to place in his hands, as has well been remarked, not a shield to defend himself, but a sword to injure those with whom his contracts have connected him. And on this question, authority is on the side of reason and justice. We are not aware, that at any place or at any period, a court of chancery has held the affirmative of the precise proposition or question which we have propounded. What the rights of the infant may be at law, or in executory contracts, or when fraud, imposition or fiduciary influence intervene, it is neither necessary, nor useful, nor perhaps scarcely proper, here to investigate. When questions of that sort have arisen, or shall arise, they have been, and must be, determined by the principles applicable to the forum, or to

[Smith vs. Evans.]

the circumstances of each case. While on the one hand there is an absence of authority to sustain a proposition as unreasonable, as that a court of equity will avoid an executed contract, and restore to the infant his property without his restoring the price or consideration, there is on the other hand mighty and controlling authority to the contrary. The greatest American authority in matters of equitable jurisprudence, Chancellor Kent, in his Commentaries, 2d vol. page 240, 4th edition, lays it down as a principle, that if the minor avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on the one side, without returning the consideration on the other. To sustain this principle, he cites *Badger vs. Phinney*, 15 Mass. Rep. 359; *Roberts vs. Wiggins*, 1 N. H. Rep. 73; *Roof vs. Stafford*, 7 Cowan's Rep. 179; *Parker J. in Hamblet vs. Hamblet*, 6 N. H. Rep. 337. Indeed the long settled principle, almost an axiom, that the party contracting with an infant is bound, but that the infant is bound or not, at his election, forcibly implies the truth of the principle maintained by Kent. For if the infant may retain what he has received and regain what he parted with, in every instance the disaffirmance of the contract would be plainly for his pecuniary advantage, and could scarcely be called, with any propriety, a case of election. Nothing but a sense of honor and justice would restrain him from setting aside all his contracts.

We are of opinion, therefore, upon the whole matter, that the decree of the Chancellor must be affirmed.

HALE vs. DARTER & THOMPSON.

1. The act of 1794. ch. 5, sec. 1, authorizing administrators and executors to convey land, sold by decedent, in conformity to the bond given for title, does not dispense with the necessity of making the heirs parties to a bill for title, where the personal representatives have failed or refused to convey.
2. A Court of Chancery will not take jurisdiction to try a naked question of boundary. See *Cooke vs. Hickman*, 3 Hump. 643: 2 John. Ch. Rep. 519.

Darter and Hale were the owners of adjoining tracts of land, in the county of Hawkins. A conflict arose between them in reference to the boundaries of their respective tracts. Darter claimed land in possession of Hale, and Hale insisting that the land was a part of his tract, Darter instituted an action of ejectment against Hale, in the Circuit Court of Hawkins. After a trial and verdict for the plaintiff, (which was set aside,) Hale filed this bill in the Chancery Court at Rogersville, on the 26th day of May, 1841, against Thompson, the administrator of Hopkins, deceased, and against Darter.

It appeared, that in 1828 Hopkins sold two hundred acres of land to Hale, and gave him a bond to convey title. In 1829 Hopkins sold and conveyed a tract of land to Gillenwaters, and Gillenwaters sold and conveyed it to Darter. Hopkins died without having made a title to Hale. Hale in his bill charged, that he could not defend himself successfully at law against the action of Darter, not having a legal title to the land, and prayed that title might be decreed to him as against the administrator of Hopkins; and that the question of boundary might be settled as between him and Darter, and an injunction issue to stay the further prosecution of the action of ejectment.

Thompson answered, and declared a readiness to convey the land to Hale according to the terms of the bond made by Hopkins; and stated, that no demand of a deed had been made.

Darter answered, and claimed the land sued for by him, on the ground, that it was included in the land sold by Hopkins to Gillenwaters, and by Gillenwaters to him; and insisted that the question was a naked question of boundary, of which a court of law alone had jurisdiction.

The case was tried by Chancellor Williams, at the May term, 1844, on bill, answers, replications and proof. He was

[*Hale vs. Darter & Thompson.*]

of opinion, that as against Darter, the complainant was entitled to no relief in equity, and that no decree could be made vesting the title to the land in him in the absence of the heirs of Hopkins, they being regarded by him as necessary parties. He, therefore, dismissed the bill.

The complainant appealed.

J. A. McKinney, for the complainant.

R. J. McKinney and Peck, for Darter.

REESE, J. delivered the opinion of the court.

So far as the administrator of Hopkins is concerned, this is a bill for the specific performance of a contract to convey lands, made by Hopkins in his lifetime with the complainant, and evidenced by a title bond. The heirs of Hopkins are not made parties to the suit, and the main question is, whether a suit in Chancery for the conveyance of real estate, which has descended to the heirs by the death of the ancestor, can be maintained against the personal representative alone, without joining the heirs. Upon general principles it is most obvious that it cannot be maintained. The general rule as to parties, says Lord Redesdale in his *Treatise on Chancery Pleadings*, p. 145, is, "That however numerous the persons may be, who are interested in the subject of a suit, they must nevertheless be all made parties plaintiffs or defendants so that a complete decree may be made between those parties;" it being the constant aim of the Court of Equity to do complete justice, by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. And Mr. Cooper in his *Treatise on the same branch of learning*, says: "the first general rule to be observed upon this subject is, to make all persons parties who are either legally or beneficially interested in the subject matter or result of the suit. The heirs, in such a case as the present, are the legal owners of the very estate

[Hale vs. Dartier & Thompson.]

sought to be conveyed. It does not belong to the personal representative either legally or beneficially, in trust or otherwise. He has nothing to do with the real estate. But as at law the personal representative is liable to be sued for the recovery of damages for his intestate's breach of a covenant to convey land, a statutory provision was made in 1794, ch. 5, sec. 1, by which it is declared to be lawful for the personal representative to make title when the testator or intestate was bound by his obligation to do so; but that he shall not be bound to make such title before the obligation has been recorded; and the statute adds, that the holders of obligations shall not charge the personal estate before the producing the obligation duly authenticated and demanding a title, and which demand shall have been refused. But this statutory provision it seems to us has no tendency to sustain a suit brought in Chancery, not to obtain a decree against the personal representative, to be paid out of the personal estate, but a decree for the conveyance of the land, the property of the heirs, in a case where they have not been made parties. He may protect the personal estate which he represents, by making a conveyance if properly demanded. If he does not do so in a proper case, he is liable by the provisions of the common law, as the statute takes for granted, to be sued at common law for damages. The statute gives no action against him; it existed before; it provides no remedy in Chancery; that matter stands as before. But it is said it creates a duty and confers a power, and that a court of Chancery may enforce the performance of that duty, by directing the execution of the legal power to convey. But as we have already said, this power is uncoupled with any interest or title. The personal representative is the mere statutory agent or conduit through whom the title of the heirs may pass; but if a suit is brought in Chancery to divest the title of the heirs, by directing a conveyance by the personal representative, it would seem by the operation of first principles, that such heirs shall be present in court as parties to be heard. An attorney in fact has sometimes power to convey land, and may have made the contract of sale, and signed the obligation to convey, yet who, for that reason, would make him the sole party, omit-

[*Hale vs. Darter & Thompson.*]

ting his principal, in a bill filed for the specific performance of a contract for the sale and conveyance of land? The title not being in the personal representative or attorney in fact, could not be divested by decree, but only by process of contempt; yet, ever since the act of 1801, ch. 6, sec. 48, the course of a Court of Chancery has in general been, not to order a conveyance, but to divest the title by the decree itself; for to that complexion and result things must come at last, if the proceedings in contempt should fail to be effective. But the question seems to me to be too free from doubt or difficulty, to merit earnest discussion. The bill, therefore, in this case, as to the personal representative of Thomas Hopkins, was properly dismissed, upon the ground above stated; and this being done, there is no relief which a Court of Chancery can give, or ought to give, to the complainant as against Darter, which cannot be as readily investigated, and as beneficially applied in the suit depending between them in the court at law, as in this court. And without going into detail, which in this case would be difficult, and scarcely useful or proper, we may say, that the allegations of the bill, the statements of the answer, and the proofs on both sides do not make a case proper for the active interference of a Court of Chancery.

The decree of the Chancellor is, therefore, affirmed as to both defendants, and the bill dismissed without prejudice.

LAMDEN vs. THE STATE.

1. The forms of judicial proceedings both in civil and criminal cases are established by the courts of justice, and must from time to time be so modified, changed and applied, as to subserve the ends of justice, and the safety of the citizen.
2. A bill of indictment for perjury, framed upon a false oath taken in proceedings in Chancery, need not set forth at large the bill in Chancery and other proceedings connected therewith. It is only necessary to set forth by description and averment so much of the proceedings as will make manifest the materiality of the oath taken.
3. No perjury can be assigned on an extra judicial oath; and, therefore, where a Clerk and Master, directed to take an account of the indebtedness of an insolvent estate, summoned at the instance of complainant a creditor, and such creditor swore falsely, that no money had been paid on a note held by him again the estate, it is held, that no perjury was committed.
4. An oath that certain notes were due and unpaid, and that deponent had received nothing in payment thereof, does not negative the existence and justice of a set-off.

The grand jury at the September term, 1843, of the Circuit Court for Claiborne county, indicted John Lamden for perjury. The indictment charges, that "one Allen Hurst, as the administrator upon the estate of one Isaac B. Butcher, deceased, on the 18th day of September, 1841, exhibited his bill of complaint in writing, in the Court of Chancery, sitting at Tazewell, for the Chancery District composed of the counties of Grainger, Claiborne and Campbell, in the State of Tennessee, against John Sharp, Peter Sharp, William Sharp, John Lamden, Elizabeth Butcher and others, creditors of said I. B. Butcher, deceased, directed to the Chancellor for the Eastern Division, sitting in Equity for the district composed of the counties of Claiborne, Grainger and Campbell, praying, among other things, that an account might be taken of the assets of the estate of said I. B. Butcher, and of the debts due therefrom, and that said assets might be applied to the payment of said debts in an equal and just proportion, as in and by the said bill of complainant remaining filed of record, in the said Court of Chancery at Tazewell, amongst other things, more fully appears, and after certain pleadings and proceedings had been had in said Court of Chancery at Tazewell, in order that the assets of said Isaac B. Butcher might be applied to the payment of the debts due from the estate of said Isaac B. Butcher in an equal and just proportion, it was ordered, adjudged and decreed by the Honorable Thomas L. Williams, Chancellor

[Lamden vs. The State.]

presiding, in said Court of Chancery, at Tazewell, that the Clerk and Master of said Chancery Court, at Tazewell, should thereafter take an account in said cause, and state amongst other things, the amount justly and *bona fide* due from said estate, (meaning the estate of said Isaac B. Butcher,) and for which said estate was legally liable; and afterwards, to wit, on the 18th day of October, 1842, at Tazewell, in the county of Claiborne, in order that an account in said cause might be taken by the Clerk and Master of said Court of Chancery, at Tazewell, and that he might state the amount of the debts justly due from the estate of said I. B. Butcher, deceased, and for which said estate was justly liable, L. H. Garrett, Clerk and Master in said Court of Chancery, at Tazewell, in obedience to the order of T. L. Williams, Chancellor in said Court of Chancery, at Tazewell, proceeded, at the office of said Clerk and Master in said court, to take an account in said cause, when and where, according to the course and practice in said court, witnesses were produced, sworn and examined in said cause upon the taking said account; and the jurors aforesaid, on their oaths aforesaid, do further present and say, that it became and was a material question then and there upon taking said account in said cause by the said Clerk and Master in said court at Tazewell, to be deposed to by said witnesses, whether the amounts of two obligations, which had before that time been executed to one John Lamden by the said Isaac B. Butcher, and by Peter Sharp, John Sharp and William Sharp, under the style and by the name of Peter Sharp & Co., and which said obligations are in the words and figures following, to wit,

"On or before the 10th of May next, we will pay John Lamden two hundred dollars, for value received of him. Witness our hands and seals, May 19th, 1833.

I. B. BUTCHER, [Seal.]

PETER SHARP & Co."

"On or before the 10th day of May next, we will pay John Lamden, two hundred dollars, for value received of him. Witness our hands and seals, May 19th, 1833.

I. B. BUTCHER, [Seal.]

PETER SHARP & Co."

[Lamden vs. The State.]

were then due and unpaid, and also whether he (meaning the said John Lamden) had received any thing in payment of said writings obligatory; and the jurors aforesaid, on their oaths aforesaid, do further present and say, that John Lamden of said county, laborer, then and there, in his own proper person, appeared as a witness upon the taking of said account, in said cause, by the said L. A. Garrett, Clerk and Master in said Court of Chancery at Tazewell, before the said Clerk and Master, and was then and there duly sworn and took his corporal oath upon the holy gospel of God before the said L. A. Garrett, Clerk and Master in said Court of Chancery at Tazewell, that the evidence he should give, &c. &c., touching the matters then in question, should be the truth, whole truth, &c. &c., the said Clerk and Master, &c. then there, having lawful and competent authority to administer an oath to said John Lamden, in that behalf, and the said John Lamden having been so sworn, &c., and intending, &c. &c., falsely, corruptly and wilfully swore before the said Clerk and Master, &c. &c. amongst other things, in substance and to the effect following, to wit, that the amounts of two obligations in writing, executed by the said Isaac B. Butcher, by the style of I. B. Butcher, and by Peter Sharp, John Sharp and William Sharp, by the style of Peter Sharp & Co., and which said obligations were as follows, to wit, &c. &c., were then due and unpaid, and that he the said John Lamden, had not received anything in payment of said obligations.

Whereas, in truth and fact the amounts of said obligations were not then and there due and unpaid; and, whereas, also he, the said John Lamden, had received something, to wit, the sum of one hundred dollars in part payment of said two obligations, and so the jurors aforesaid say," &c.

The defendant pleaded not guilty, and the case was submitted to a jury at the January term, 1844, Judge R. M. Anderson presiding.

The facts of the case are fully stated in the opinion of the court.

The counsel for the defendant requested the Judge to charge the jury, that there was no sufficient assignment of perjury

[*London vs. The State.*]

in the indictment, and that the indictment was insufficient, because it did not set forth and recite the record of the proceedings in Chancery, therein referred to, and that the evidence was all, therefore, inadmissible. This the court refused to charge, but stated that the indictment was good.

The defendant was found guilty by the jury, who fixed his term of imprisonment in the penitentiary at three years. The defendant moved the court to grant him a new trial. This motion, as well as a motion in arrest of judgment, having been overruled, the defendant appealed.

Peck and Cocke, for the plaintiff in error.

Attorney General and J. A. McKinney, for the State.

REES, J. delivered the opinion of the court.

In the year 1838, the plaintiff in error sold a tract of land to one I. B. Butcher. In security for the consideration, the said Butcher gave to the plaintiff in error two several bills single of the same date and tenor, each for the sum of two hundred dollars, payable to the said plaintiff in error, in the May of the following year, to each of which, Peter Sharp & Co. affixed their signature, without their seal, as sureties. These instruments were written upon the same piece of paper, and delivered to the plaintiff, and by him taken into his possession.

In the course of the following year, 1839, Butcher, who was a "steam doctor," claimed to have rendered, and did render, to the plaintiff in error himself, and a servant of his, medical services in that line. His claim for these services not having been paid, as he alledged, he brought suit before a Justice of the Peace against the plaintiff in error, to recover their value. On the trial the plaintiff in error alledged that he had paid for them; but this not appearing in proof, the Justice rendered a judgment against the plaintiff in error for the sum of one hundred dollars. It may be remarked, that the whole proceeding was *coram non judice*, and merely void; the Justice having no jurisdiction, upon a claim so evidenced, to render a judgment

[Lamden vs. The State.]

for more than fifty dollars. The plaintiff in error, however, on other grounds, protested at the time against the justice of judgment; yet throwing upon the table, before the Justice, the piece of paper on which were written the two instruments hereinbefore described, he directed the Justice to endorse a credit thereon for one hundred dollars, the amount of the pretended judgment. The Justice did so; and placed the endorsement, locally, upon the blank space between the two instruments. The plaintiff in error, at some subsequent period, separated the two instruments by removing the blank paper between them, in which process the credit endorsed by the direction of the plaintiff in error entirely disappeared. Subsequently I. B. Butcher departed this life, and one Allen Hurst became his administrator, and filed a bill in Chancery at Tazewell, to ascertain the extent of indebtedness of the estate, and to marshal the assets in a *pro rata* payment of the same, and an account was ordered accordingly.

In taking the account before the Clerk and Master, the plaintiff in error although named as a party defendant in the bill presented no vouchers or evidences of claims against the estate, relying, as he said, upon the liability and solvency of Peter Sharp & Co., and, therefore, on motion of the complainant, the Clerk and Master issued a *subpoena duces tecum*, and the two bills single were produced, and the Clerk and Master imposed an oath upon the plaintiff in error, and he swore, as the record of the Clerk and Master sets forth, "that the amount of said notes was yet due and unpaid, and that he had not received anything in payment of the said notes, or any part thereof."

Upon this statement is the perjury charged in the bill of indictment assigned. The bill of indictment is not so framed as to set forth at large the bill in Chancery, and other judicial proceedings connected therewith and consequent thereon, so as in that way to manifest the import and materiality of the oath of the plaintiff in error, which occurred in the course of, and as a part of those proceedings; but to manifest the import and materiality of such oath, it is framed as indictments for perjury have been framed in England, since the act 23 Geo. 2, and in N. Carolina, since the act of 1791, by virtue of the provi-

[Lamden vs. The State.]

sions and purview of those acts; namely, by description and averment of so much of the nature and substance of those proceedings as it was supposed would make distinctly manifest the import and the materiality of the oath which was taken. And this is supposed to be erroneous, and is the first error assigned in argument by the counsel of the plaintiff.

It is insisted, that the first mode is the common law mode in force and use in England until the 23 Geo. 2, and in North Carolina until the act of 1791; that those statutes are not in force here, and that, therefore, the original common law form of framing an indictment for perjury, must continue to be the only legal and proper form with us, until the intervention of the legislature shall produce a statutory change. On the other hand it is said, that forms of judicial proceedings, whether in civil or criminal cases, have at no time, in point of fact, arisen, and from their objects and nature could scarcely arise in legislative sanction; but that they were enacted by the courts, and must, by the courts from time to time, be so changed, modified and applied, as to subserve the safety of the citizen and the ends of public justice, in the convenient and intelligible transaction and despatch of public business; that the intention of the legislature in this very instance, to correct a great evil and furnish a salutary change in the forms of judicial proceedings, resulted from no want of power in the courts to have made the change themselves, but because, in their somewhat unreasonable and too tenacious adherence to ancient forms and precedents, they neglected or refused to do so. It is insisted that, at the very foundation of our State government, our courts, in the exercise of a legislative power inherent in the nature of their functions, adopted and introduced the improved forms in indictments for perjury, which arose from the statutes of Geo. 2, and of N. Carolina, and which have been used, sanctioned and enforced ever since, now nearly fifty years; and that if, originally, the power of our courts, to have adopted these forms without the intervention of the legislature, were questionable, still, at this day, we must adhere to the usages and forms established, and cannot be drawn back to forms, inconvenient, if not impracticable and absurd, and now obsolete in England,

[Landen vs. The State.]

and never in use and force here; and of this opinion are the court. But the question is the less material in this case, because of our opinion on other points.

When the instruments in question were produced by the prisoner before the Clerk and Master as evidences of claim against the estate of Butcher, in obedience to the *subpoena duces tecum*, he had nothing more to do, on his part, if the genuineness of the instruments were admitted. If that were questioned, he could not establish their execution and validity by his oath; that must have been done by the attesting witness, if such there were, and if not, by proof of the hand writing of the makers according to law. In all this, the oath of the payee or claimant could not be taken, or his testimony be heard. But the vouchers being genuine, the laboring ore was thrown into the hands of the other party; what payments had been made? What set-off existed? If any were alledged, it was for the representative of Butcher to show by the production of receipts and by the proof of payment or of set-off. In all this, the oath of the prisoner was out of the question. If the statute of limitations had appeared to bar the claim, and had been insisted on by the other side, as well might the Clerk and Master, at the instance of the prisoner, have enquired of the representative of Butcher, upon his oath, whether he or his intestate had made no promise or acknowledgement that would take the case out of the statute. This summary inquisition, by means of the oath of the other party, breaks down all the well considered and long settled rules of law, and is, in the utmost degree, perilous to the consciences of our citizens. The oath in this case was extrajudicial. If the Clerk and Master may be supposed, in taking an account under such circumstances, to be clothed with all the power of the Chancellor, when proceeding by bill of discovery, the *casus* for the exercise of such a jurisdiction did not exist. For the record shows that the circumstances of the trial before the Magistrate, and the medical services of Butcher, such as they were, were known to many persons, and in this very case, proved by many persons.

Again: if the Clerk and Master had possessed the power, under the circumstances, and for the end in view, to have ad-

[Lamden vs. The State.]

ministered the oath to the prisoner, and to have questioned him on the subject, still he did not so frame his interrogatories as to induce an answer false in the legal or ordinary sense of its terms; the prisoner swore only that the notes were unpaid, and that he had received nothing in payment. This does not negative the existence or the justice of the set-off for medical services, or the fact of the credit as entered by the Justice; that endorsement was not a payment, but the evidence merely of payment. It is true, indeed, that a man, careful of conscience and character when thus interrogated, would not place himself within the narrow and painful limits of mere literal truth, still if this be done, it does not constitute a proper case for the assignment of perjury.

The opinions by us entertained upon these two last points, go to the foundation of this prosecution, and supersede the necessity of looking into the charge of the court, and considering what portion of that, if any, may have been erroneous, and, also, whether the alledged variance between the record of the Clerk and Master, as to the description of the notes or instruments, and the description of them in the indictment, be material and important.

The judgment of the Circuit Court, upon the whole matter, will be reversed, and the prisoner be discharged.

WALLEN vs. HUFF.

1. An equity of redemption is barred by a seven years possession of mortgagee, holding adversely with the knowledge of the mortgagor, under a purchase of an outstanding claim.
2. An answer is evidence against the party making it without the production of the bill, if the answer be not responsive to the bill, but sets up new matter in defence.

This bill was filed by Wallen against Huff, in 1838, in the Chancery Court at Tazewell.

The bill sets forth a mortgage of certain land, lying in Claiborne county, executed by Wallen to Huff, in 1826, to secure Huff in the payment of a sum of money advanced by Huff to complainant. The defendant answered, and relied on an adverse holding of the mortgaged premises for more than seven years, under and by virtue of titles derived from Word and McClain, by purchase of their outstanding titles. The answer also alledged, that this adverse holding was with the knowledge and approbation of complainant. The answer made an exhibit of an answer made by the complainant to a bill filed against complainant and defendant by Miller and Woods, to subject this land, to the payment of a debt due them, as the property of Wallen. Huff answered this bill, and claimed the land as his, by virtue of a purchase of outstanding titles from Word and McClain, and an adverse holding for seven years. The defendant, Wallen, adopted the answer of Huff. The defendant in this case, Huff, did not make an exhibit of the bill in the case of Miller and Woods against Wallen and Huff, but the answer alone, which set up the statute of limitations as a defence.

The case was tried by Chancellor Williams, at the June term, 1841, on bill, answer, replication and exhibits.

He decreed in favor of complainant, and directed an account of money advanced by plaintiff, and of the rents and profits.

The defendant appealed.

Peck, for the complainant.

R. J. and J. A. McKinney, for the defendant.

[Wallen vs. Huff.]

TURLEY, J. delivered the opinion of the court.

This is a bill on the part of the complainant, to be permitted to redeem lands mortgaged in 1826, to the defendant. The redemption is resisted upon the ground, that the equity has been lost, because the defendant acquired no title to the premises by virtue of the mortgage; but had been compelled after the date of its execution, in order to preserve himself, to purchase the same from one John Word and Thomas McClain, to whom it legally belonged; and that from that time the defendant claimed and held the land, not under the mortgage, but in his own right as vendee under Word and McClain, adversely to any pretended right of complainant, and that with his full knowledge and assent, and that more than seven years have elapsed since that time before the filing of his bill of complaint.

Many questions involving the rights of mortgagors and mortgagees have been argued for the complainant, all of them in his favor, if his case were fitted to them. But the allegation of the defendant, that he has claimed ever since his purchase from Word and McClain, to hold the premises absolutely in his own right as vendee under them, with the full knowledge and approbation of the complainant, and that more than seven years have elapsed since such adverse holding, is too well established to admit of controversy.

In 1835, Thomas Miller and William Woods filed a bill in the Chancery Court of Rogersville, against Wallen and Huff the present complainant and defendant, seeking to subject the premises now in dispute to the payment of a debt due to them from Wallen.

To this bill defendant Huff set up the same defence which he now relies upon. In his answer he distinctly and positively asserts, that he purchased the land from Word and McClain; that he has held for more than seven years adversely to his co-defendant Wallen under such purchase, and with his knowledge and approbation. Wallen in his answer refers to his co-defendant, Huff, and says, that he knows the matters and things stated therein to be true; that Huff derives his title to that portion purchased from John Word through him and not

[Wallen vs. Huff.]

the respondent; and as to all the residue of the land, he disclaims all right and title, for the reasons stated in Huff's answer; and that he is the real owner, having paid for the respondent the full and entire value of the same. In addition to this Daniel Huff having, in 1835, executed a deed of conveyance to one Hugh Graham for a part of the land in dispute to secure him in the payment of a sum of money, John Wallen did on the 22d of October, 1835, execute to the said Graham a deed of disclaimer in which he said,

"I set up no claim to said lands, and by these presents disclaim any interest or title in the same."

After the direct statement in his answer, filed on oath, and in his deed under seal, not only admitting but asserting the defendant Huff's right, to hold otherwise, and set it up would be absurd. But it is argued that the answer of complainant is not evidence against him, because the bill to which it responds is not produced. To this the answer is plain and explicit. The bill is filed to subject the land to the payment of the debt of complainant against Wallen. Huff answers and defends himself by an assertion of a right to the premises in himself, and not derived through his co-defendant; but by purchase from others, and a possession of more than nine years, making his title good by the operation of the statute of limitations. Huff's answer then upon this point sets up new matter in defence, and is not responsive to the bill. There is then no necessity to produce the bill for the complete understanding of his answer, and Wallen's answer referring to Huff's, and adopting it, stands in the same position. Huff's answer is necessary to the understanding of Wallen's, but the bill to neither.

That a mortgagee is not prohibited from purchasing an outstanding title, is not controvertible. That he may hold under such outstanding title, and adversely to the mortgagee is equally incontrovertible, and if such adverse holding be with the knowledge of the mortgagee, the statute of limitations will form a complete protection against the equity of redemption. But in this case, such holding is not only admitted by the complainant, but he absolutely relinquishes and disclaims any title or interest in the premises.

[*Edmonds vs. The State.*]

We, therefore, hold that the complainant hath not lost any equity of redemption which may have existed under his mortgage of 1826, and reverse the decision of the Chancellor, and dismiss the bill.

NOTE.—The mortgagee is a trustee by deed for mortgagor, and therefore the statute of limitation does not apply whilst this relation continues unchanged by the act of the parties. Angel on Limitations. And time only changes the relation of the trustee when a presumption of title arises. 4 Kent, 187: 3 John. Ch. 129. 1 Paige, 48: *Yarborough vs. Newell*, 10 Yerg. 380. 3 Yerg. 528; and this presumption may be rebutted by circumstances. *Overton vs. Bigelow*, 3 Yerg. 522. The general rule is, that there may be redemption within twenty years. *Ross vs. Norvell*, 1 Wash. 14. As to what constitutes an adverse holding, See *Yarborough vs. Newell*, 10 Yerg. 382: *Duke vs. Harper*, 6 Yerg. 280: *Porter vs. Porter*, 3 Hump. 586.

EDMONDS vs. THE STATE.

In proceedings against the father of a bastard child, to render him responsible under the provisions of the act of 1741, ch. 14, for its maintenance, it must appear of record that the child was born in the county in which the proceedings are instituted.

This is an appeal by defendant from a judgment of the Circuit Court of Jefferson county, convicting the defendant Edmonds of having begotten a bastard child, and making an order on him for its maintenance.

Cocke and Reneau, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is a proceeding in the county of Jefferson, against Joel Edmonds, to charge him with the support and maintenance of a bastard child. It appears nowhere in the record, that the child was born in the county, or is likely to become a charge upon the county. The affidavit of the mother discloses only the fact, that Joel Edmonds was the father of a bastard child, of which she was delivered on the 6th day of February, 1840.

[Edmonds vs. The State.]

The warrant, issued by the Justice before whom the information of the mother was lodged, contains nothing more specific than the affidavit, and the judgment of the Justices before whom the warrant was returned adjudged only that the defendant was guilty of begetting the bastard child as charged in the warrant. So in the proceedings in the County and Circuit Court, the defendant is adjudged the father, and an order made upon him for the maintenance of the child; but it is stated in no part of the proceedings, that the child was born in the county of Jefferson, or that the county is legally chargeable with its support. By the provisions of the statute of 18th Elizabeth, ch. 3, it is enacted, "that two Justices of the Peace, whereof one to be of the quorum in or next to the limits where the parish church is, within which parish the bastard shall be born, upon examination of the cause and circumstances, shall and may, by their discretion, take order, as well for the punishment of the mother and reputed father of such bastard child, as also for the relief of every such parish in part or in all; and shall and may likewise, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly or other sustentation for the relief of such child in suchwise as they shall think meet and convenient," &c. Under this statute, it hath been adjudged in England, that the place of birth must be set forth in the order, because it may be born in a parish where the two Justices who made the order had no jurisdiction, and that it may appear that it was born in the parish to which the relief was ordered. Stile, 368; Dalt. 47; Bacon's *Ab. Bastardy*. By the provisions of our act of 1741, chap. 14, any Justice of the Peace, upon his own knowledge, or upon the information made to him, that any single woman within his county is delivered of a child, may cause such woman to come before him, examine her on oath concerning the father; and in case such woman shall, upon oath before the Justice, accuse any man of being the father, and stand charged with the maintenance of the same, as the County Court shall order. Now, under this statute, the order of the County Court of the county comes in place of the order of the two Justices under the statute

[Carmichael vs. Carmichael et al.]

of Elizabeth, and the same certainty must be required in the one that has been adjudged to be required in the other. We have seen, that under the statute of Elizabeth the place of the birth must be set forth in the order made by the Justices; so it must be in the order made by the County Court, and for the same reasons, viz, that it may appear that the County Court had jurisdiction, and that the child was born in the county to which the relief was ordered. For the want of this, the order of the County Court was irregular and erroneous, for which it should have been quashed by the Circuit Court, and remanded to the County Court. This was not done; but, on the contrary, the Circuit Court proceeded to take order upon the subject, which is equally irregular and erroneous, and for the same reason. We therefore reverse the judgment heretofore made in the case in the court below, and remand it to the County Court of Jefferson, to be proceeded in as the law directs.

NOTE.—It must appear, that the child was born in the parish for whose relief the order of bastardy is made. 1 Strange, 437; 2 Raymond, 1363; 9 East, 25; 13 East, 51. It is sufficient if it appear on any part of the order. 6 Term, 148. Every reasonable intendment shall be made in favor of an order of bastardy. 3 East, 58; 8 Mass. 4.

See *Kirkpatrick vs. The State*, Meigs, 124; *The State vs. Coatney*, 8 Yerg. 210; *Goddard vs. The State*, 2 Yerger, 96; *Steele vs. Register*, 3 Haywood, 37; *Ingram vs. The State*, 4 Haywood, 221; 1 Yerger, 92.

CARMICHAEL vs. CARMICHAEL et al.

1. Dower is connected with and inheres in the title of the heirs, and that which bars the right of the heirs bars the widow's right to dower.
2. Where the land of the deceased husband was sold under a void judgment and the possession voluntarily relinquished by the widow, who failed to assert her right to dower by suit for twenty years, it is held that she had lost her right.

Jane Carmichael filed this bill in the Chancery Court at Jonesborough, against D. Carmichael and Williams, on the 10th October, 1842, for dower and damages.

Archibald Carmichael died in 1819, seised and possessed of three hundred and thirty-six acres of land in Washington

[Carmichael vs. Carmichael et al.]

county, leaving the complainant his widow, and six children. Kyle recovered judgment against the administrator of A. Carmichael in 1820, for \$3473, in the County Court of Hawkins; and there being no personal estate to satisfy the *fi. fa. a sci. fa.* on the suggestion of real estate descended to the heirs, issued, and service thereof was acknowledged by the guardian of the heirs, who were all minors. Judgment was taken by default against the heirs on the *sci. fa.* and the land was sold on the 20th November, 1820, by the sheriff, and purchased by Daniel Carmichael, and by him sold and conveyed by deed to Williams in 1821. In 1823, the sheriff made a deed of the land to Carmichael. It does not appear that the widow resisted the sale of the land under the judgment against the heirs, or that she set up a claim to dower. She relinquished the possession of the land voluntarily.

The bill charges, that she set up her claim to dower at the time of sale, but was induced to believe by the defendant Carmichael that she had no right to dower. This is denied by the answer, and not proved. The bill charges, that the land was purchased at \$1200, that it was worth \$2800, and that defendant Carmichael bought, as the friend of complainant, and promised to sell again and pay over to her all he should get over the sum of \$1200. This is denied in the answer, and is not sustained by proof.

It was tried on bill, answer, replication and proof, at the May term, 1844, by Chancellor Williams. He was of the opinion that the sale of the land under the judgment was void, that the statute of limitations did not bar her right of dower, and appointed commissioners to lay off dower, and ordered an account to be taken of rents and profits thereof from the death of A. Carmichael.

The defendant appealed.

T. A. R. Nelson, for complainant.

1. The sale of the land was void because there was no personal service of *scire facias* upon the heirs. *Combs & Hayne vs. Young's widow and heirs*, 4 Yer. 218; *Simmons vs. Wood*, 6 Yer. 522; *Crutchfield vs. Stewart's lessee*, 10 Yer. 237.

[Carmichael vs. Carmichael et al.]

2. The widow's right to dower is not barred by time or the statute of limitations. *Guthrie vs. Owen*, 10 Yer. 339.

3. Damages for the detention of dower may be assessed in chancery. *London vs. London*, 1 Hum. 13.

R. J. & J. A. McKinney, for defendant.

GREEN, J. delivered the opinion of the court.

This case differs widely from the case of *Guthrie vs. Owen*, (10 Yer. 339,) in its facts, and consequently the decision of it must be controlled by entirely different principles.

In that case, Owen held under the heirs, and was clothed with the title of the heirs, and was consequently held to be in no better situation as regards the widow's right of dower than the heirs would have been. In this case, Williams holds under a deed from Daniel Carmichael, made when he did not pretend to have any title, and consequently, unless Carmichael afterwards became vested with the title of the heirs, the possession of Williams, for twenty-five years, has been held under the deed of a stranger to the title, and adversely to the heirs. But the bill alledges, and so the fact is, that the proceedings by *sci. fa.* to subject the land of the heirs to the satisfaction of the judgment against their administrator, were wholly void, the *sci. fa.* not having been served on them, but on their guardian only. *Combs vs. Young*, 4 Yer. 218; *Simmons vs. Wood*, 6 Yer. 522; *Crutchfield vs. Stewart*, 10 Yer. 257. Williams's possession under the Carmichael deed is therefore a bar to the right of the heirs, or such of them as were twenty-one years of age three years before this bill was brought; and as the right to dower is connected with and inheres in the title of the heirs, that which operates as a bar to their title is a bar to the right of dower.

2. But we think if the proceedings against the heirs had been regular, so that the defendant Williams's possession had been taken and held by virtue of a title derived from the heirs, the circumstances of the case are such as that, coupled with the great length of time that has elapsed, ought to repel the complainant's right to dower. She admits, in her bill, that she

[*Carmichael vs. Carmichael et al.*]

concurred in the sale of the land, and voluntarily relinquished possession of the premises. True, she alledges that she did so under the influence of ignorance of her rights, and delusive and false promises of defendant Carmichael; but we must regard her as having knowledge of the law of her case, and the allegation of fraud is denied and not proved.

We have then the case of an agreement of a dowress for the sale of the land, a voluntary relinquishment of possession, and a forbearance to assert her claim to dower for more than twenty years. The defendant Williams, too, purchased under the influence of this abandonment of her claim for dower, and has for twenty years held possession of the land so purchased, in the full confidence that he had a good title, free from all incumbrance.

Under these circumstances, we think it would be inequitable now to permit the complainant, through the aid of this court, to assert a right thus abandoned, which she has permitted to lie dormant so long.

The decree must be reversed, and the bill dismissed.

NOTE.—Where dower has not been assigned to a widow in the lands of her deceased husband, a possession of seven years by the heirs or those who come in under them will not, by virtue of the act of 1819, ch. 23, sec. 2, bar her right thereto. *Guthrie et ux vs. Owen's heirs*, 10 Yerger, 339.

In South Carolina it is held that the statute of limitations will protect a purchaser against a claim of dower as well as against any other claim. *Boyle vs. Rowland*, 3 Desaus. 555.

In New Jersey an action of dower is barred after twenty years. 1 Harrison, 107.

In Maryland it is held that the statute of limitations forms no bar in equity to the claim of dower. 2 Gill & Johnson, 469.

By the English law, the wife's remedy by action for her dower is not within the ordinary statutes of limitation. 4 Kent, 69. If dower be not assigned to the widow during her life, the right is extinct. 4 Kent, 60, note.

By the revised laws of New York, dower must be demanded within twenty years from the death of the husband or from the termination of certain disabilities mentioned in the statute, or the claim is barred.

BARNARD vs. YOUNG.

1. Where a jury, under the act of 1815, chap. 53, returned a verdict in favor of the defendant for the sum of \$17, without making any response to the claim of the plaintiff, and thereupon the defendant came in and released the verdict for the said sum: it was held, that there was nothing upon which the court could render judgment, and that a *verdict de novo* should be awarded.
2. The court has no power to amend the verdict of a jury.

Barnard sued Young by warrant "in a plea of debt due by note for \$15." The Justice of the Peace gave judgment in favor of the plaintiff for the sum of \$24. The defendant appealed. It was tried by Judge R. M. Anderson and a jury of Tazewell. The defendant gave evidence of a set-off, and the jury returned a verdict in favor of the defendant for the sum of \$17 47½, in which verdict nothing was inserted as to the note sued on. The defendant by counsel moved the court, after the verdict was rendered and the jury discharged, to amend the verdict so as to make it appear thereby that it was paid. This was ordered, and the verdict so amended was entered. The defendant then released the \$17 47½, and judgment was rendered, that "defendant go hence and recover of plaintiff his costs."

The plaintiff appealed.

Peck and Cocke, for plaintiff.

The record does not show who appeared for the defendant.

GREEN, J. delivered the opinion of the court.

Barnard sued Young on a note for \$15. The cause was brought into the Circuit Court and tried before a jury, who found the following verdict: "We do find that the plaintiff is indebted to the defendant in the sum of seventeen dollars and sixty-seven cents and one fourth of a cent." The verdict so found was recorded and the jury discharged. After the minutes were signed the next day, the defendant moved the court to amend the verdict so that it should read: "We find that the note sued on has been fully paid and satisfied, and that the

[Barnard vs. Young.]

plaintiff is indebted to the defendant the sum of seventeen dollars and forty-seven and one fourth cents." This amendment was made.

A motion was made for a new trial, which was overruled, on the defendant's releasing the verdict of \$17 47½ in his favor. Reasons were then filed in arrest of judgment; which were overruled, and the plaintiff appealed to this court.

We are of opinion that the court had no power to amend the verdict after the jury had been discharged. Any substantial addition which may have been made, was the act of the court, and not the result of the operation of the mind of the jury. If the court may thus, without the consent of the jury, and after they have been discharged, change the verdict, so as to make it what the court thinks it ought to be, the judgment of the court, in the trial of facts, would be substituted for that of the jury. The question then recurs, if this amendment was unauthorized, was there any finding upon which the judgment in this case could have been rightfully pronounced. The jury found that the plaintiff was indebted to the defendant \$17 47½. The defendant then came and released this verdict; and as the jury find nothing in relation to the note upon which the suit was brought, there is nothing upon which the court could pronounce judgment. If the jury had found for the defendant, and had gone on to find the plaintiff was indebted to him \$17 47½, the first part of the verdict would have been a response to the issue upon the note, which would have been unaffected by the release of the defendant, and consequently a judgment might have been rendered. But they find nothing upon that issue; and simply say, they find "the plaintiff is indebted to the defendant \$17 47½."

We regret that a just regard to those technical rules, the preservation of which we deem important for maintaining the symmetry of our institutions, and consequently important for the preservation of the rights of the citizen, compels this court to reverse the judgment in this case.

The judgment will be reversed, and this court, proceeding to give such judgment as the Circuit Court should have rendered, arrests the judgment and awards a trial *de novo*.

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SWORD vs. THE STATE.

1. In a case of misdemeanor where the allegations of the indictment necessarily involves a negative of the words of the statute creating the offence, the indictment is good. See *Peck vs. The State*, 2 Hum. 85; *Budd vs. The State*, 3 Hum. 483.
2. Where a statute directs that a defendant on conviction shall be fined and imprisoned, and the circuit court on conviction fined the defendant, but failed to direct the imprisonment, the supreme court will, under the provisions of the act of 1809, ch. 49, order the imprisonment.

Philip Sword was indicted, under the act of 1842, ch. 141, and convicted in the Circuit Court of Knox county, for selling a quart of whisky to a slave without permission from the master. He was fined fifty dollars by Scott, the presiding Judge. He appealed.

W. Swan, for plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an indictment against Philip Sword, under the act of 1842, ch. 141, for retailing spirituous liquor to a slave. The bill of indictment charges that he, Philip Sword, on the 7th day of April, 1843, in the county of Knox, unlawfully did vend and sell one quart of spirituous liquor called whisky to one Reuben, a negro slave, the property of Wm. Swan, without the said slave having a permit in writing from his master and owner so to do. To this bill of indictment, defendant pleaded not guilty. He was convicted upon his trial, moved in arrest of judgment, which was overruled, and thereupon he prosecuted an appeal to this court. And it is now contended, that the indictment is bad, in charging that the slave had no permission to buy; *non constat*, that the defendant had no permission to sell. This is a legal quibble which we cannot sustain. The words of the statute are: "without permission from his or her owner, master or mistress, or agent of the owner." The obvious common sense meaning of the words is, that the slave shall have permission; and this he will have, whether the permission be given to the

[Noe vs. Hodges.]

slave himself or to the retailer; and if it be true, that the negro had no permission to buy, it is equally true the defendant had no permission to sell. We therefore affirm the judgment, overruling the motion in arrest of judgment: but inasmuch as the Circuit Judge has neglected in the judgment below to inflict the punishment prescribed by the statute, in not imprisoning the defendant, we correct the judgment in that particular, by giving such judgment as ought to have been given, and therefore direct that, in addition to the fine imposed, the defendant be imprisoned one week.

NOE vs. HODGES.

1. A jury may give interest in the name of damages for a breach of contract in failing to deliver personal property.
2. Where the court charged the jury, that they might give interest or not, as they choose, the judgment should not be reversed, even if the charge were erroneous, unless the jury did give interest.

This is an action on the case, instituted in the Circuit Court of Grainger county, by Hodges against Noe, for breach of contract in failing to deliver one hundred head of hogs. Plea, non-assumpsit. It was submitted to a jury at the August term, 1842, Luckey, Judge, presiding. The counsel for the plaintiff requested the court to charge the jury, that if they found the issue in favor of the plaintiff, the plaintiff would be entitled to interest from the time the defendant failed to deliver the hogs according to contract, on the sum they should ascertain to be the difference between the price agreed on by the parties and the market price at the time of the breach of the contract. The court charged the jury that they might give interest by way of damages, or not, as they thought proper.

To this single part of the charge of the court, the defendant excepted, and filed his bill of exceptions, in which the evidence was not set forth.

The jury rendered a verdict in favor of the plaintiff for the sum of \$330, damages.

[Nee vs. Hodges.]

The defendant moved the court for a new trial. The motion was overruled, and judgment rendered on the verdict.

The plaintiff also excepted to the action of the court in signing defendant's bill of exceptions without the whole of the charge of the court and the evidence being set out therein; and more especially because, as the counsel of plaintiff contended, from the proof and the verdict it was manifest the jury did not give interest.

The defendant appealed.

Cocke, for plaintiff in error.

R. J. McKinney, for defendant in error.

GREEN, J. delivered the opinion of the court.

This action was brought against the plaintiff in error by Hodges for a breach of contract in failing to deliver a certain number of hogs at the price stipulated in the contract.

On the trial, the court told the jury, that they might give interest by way of damages, or not, as they might think proper, upon such sum as they might find to be the difference between the price agreed on and the value of the pork at the time it was to be delivered. To this direction the defendant excepted, and presented his bill of exceptions upon that point of the charge alone, without setting out any of the evidence in the cause, which bill of exceptions was signed and sealed by the court. To this practice, the plaintiff excepted and presented his bill of exceptions, which was also signed and sealed by the court.

It is certainly true, that the demand for which this suit was brought, does not bear interest under our act of assembly; but we perceive no objection to the jury (in estimating the damages) fixing the amount of their verdict by the sum they think the plaintiff was entitled to at the time the contract was broken and interest on that amount added together. Although therefore, strictly speaking, a plaintiff is not entitled to interest in such a case as this, yet if the jury should arrive at the amount of the damages they find, by the process indicated by the court, it

[Helm vs. Rodgers.]

would not be error. But if this charge of the court was erroneous, inasmuch as it was left to the jury to give interest or not, as they might choose, it may be that no interest was computed, and that if the testimony had been set out, this court might see with certainty that the verdict was just such a one as must have been rendered, had the charge been unexceptionable. We do not, therefore, deem it proper to grant a new trial.

Affirm the judgment.

NOTE:—Where, after a creditor has endeavored to obtain payment, there has been a wrongful withholding of a debt arising out of a contract, which does not carry interest, the jury may allow interest in the shape of damages for the unjust detention of the money. 3 Bing. 353; 2 C. & P. 88. See 15 East, 233.

Interest is not allowed on unliquidated damages. Peters's C. C. Rep. 86, 224. It is however generally in the discretion of the jury to give interest in the name of damages. *Willings vs. Consequa*, Pet. C. C. Rep. 172. Whenever agreements will admit of it, the court will substitute certainty for uncertainty in relation to compensation for the non-execution of such agreements. Ordinary interest as such, or in the form of damages, seems to have been wisely adopted as the principle of this substitution. Where a man who has contracted to deliver or convey property or perform services, fails to do so, the law will presume that the person with whom the contract was made would have derived a benefit from the performance of such contract equivalent to the interest of the money which represents its value. *Talbot vs. Bradford's heirs*, Cooke, 445.

HELM vs. RODGERS.

1. The issuance of process in a civil suit on Sunday without a compliance with the statutory provisions authorizing it, is matter in abatement of the process.
2. An amendment of a plea in abatement as to matter of form or refusal so to do, is not error for which the supreme court will reverse. The decision of such questions belongs to the discretion of the circuit judge.

Helm instituted an action on the case against Rodgers, in the Circuit Court of Jefferson county, for slander. The clerk endorsed on the writ these words: "Issued the 15th day of April, 1838." At the return term, the plaintiff filed a declaration, and an entry was made on the records as follows: "By agreement, time is given to make up the pleadings in this case, with leave to plead in abatement."

At the next term this agreement was continued, and at the next succeeding term, to wit, the December term, 1838, the

[Helm vs. Rodgers.]

defendant filed a plea in abatement, which averred, that "said writ, as appears by the endorsement thereupon, was issued upon the 15th day of April, in the year 1838, in the county of Jefferson and state of Tennessee; and the said defendant avers, that at no time before or at the issuance of said writ was oath or affirmation made and endorsed on the back of said writ, that the defendant was, on the 15th day of April, 1838, removing, or would remove himself or property, beyond the jurisdiction of the Circuit Court of Jefferson, on the Sabbath, to wit, the 15th day aforesaid; nor was an endorsement made by the clerk of the Circuit Court of Jefferson, who issued said writ, at the time of the issuance thereof, or at any other time, that said writ was obtained on the oath of the plaintiff, his agent or attorney."

This plea was verified by affidavit, to which the plaintiff demurred, on the following grounds: 1st, that said plea is not entitled as of any term. 2d, because the name of the suit is not prefixed to the affidavit of verification. 3d, because it was not pleaded under a special imparlance granted to the defendant. The Circuit Judge sustained the demurrer, and thereupon the plaintiff moved for leave to amend his plea in reference to the objections aforesaid, which was ordered.

At a subsequent term, on argument, Judge Anderson overruled the demurrer to the plea, and ordered that "the suit be abated and the defendant go hence."

The plaintiff appealed.

Peck, for the plaintiff.

Hynds, for the defendant.

REESE, J. delivered the opinion of the court.

In this case three questions are made: Is the issuance of process in a civil suit upon the Sabbath day matter in abatement of the writ or summons? We think it is, by the effect and purview of the acts of 1794, ch. 1, sec. 9, 1777, ch. 8, sec. 6, and 1821, ch. 1, sec. 2, 3, and probably independently of the provisions of those statutes. 2d, Is the averment that the process issued

[Helm vs. Rodgers.]

upon the 15th December, the Sabbath, *as appears by the endorsement thereon*, a sufficient averment that it in fact issued on the 15th? We think it is. It avers both that it issued on that day and that such fact appears by the legal and necessary endorsement upon the writ. 3d, Is the amendment of a plea in abatement by the leave of the Circuit Court, in a matter of form, such an error as can be assigned and relied on in this court for the purpose of reversal? We think it is not. Certainly, pleas in abatement, being looked upon as dilatory, are to be discouraged by the court. This is the general principle; and, therefore, if the amendment had been refused, ample as are the powers of the Circuit Court to grant amendments, we should certainly not have held such refusal to have been erroneous. But the amendment was allowed. It was legally competent for the Circuit Judge, in the exercise of his discretion, so to have done; and it would be a difficult and invidious duty in this court to speculate on what would have been their own action in such a case, if sitting in the Circuit Court, and to hold it to have been an abuse of the legal discretion of the Judge. We cannot therefore hold this grant of leave to amend, to have been an error for which we ought to reverse the judgment. The same will be affirmed.

NOTE.—Law processes are not to be served on Sunday, unless it be in cases of treason and felony. Sunday is not a day in law for proceedings. Tomlin, vol. 3, 358 See Petersdorf, vol. 4, 759, for a collection of English authorities in reference to contracts and legal proceedings on Sunday.

PULSE vs. THE STATE.

A contract to sell spirits to a slave, which is not completed by delivery, is not indictable.

Pulse was indicted in the Circuit Court of Jefferson county, for selling one quart of whisky to Wesley, a slave without the permission of the master of said slave. The case was tried at the April term, 1843, by Judge Robert M. Anderson, and a jury.

It appeared that Pulse had sold a barrel of whisky to the slave without the consent of his master, and had employed an agent to deliver it to him. The whisky was, however intercepted before it was delivered. The Judge charged the jury, that a sale without delivery would complete the offence created by the act of 1842; that the legislature intended by the passage of the act to cut up by the roots all traffic with slaves in intoxicating liquors, and that this object would be best promoted by this construction of the statute.

The jury found the defendant guilty, and a motion for a new trial having been overruled, the defendant was sentenced to be imprisoned one week, and fined five dollars. From this judgment he appealed.

Cocke, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the Court.

Elijah Pulse was indicted and convicted of the offence of selling spirituous liquors to a slave. Upon the trial, it appeared that he had contracted to sell, but had not delivered the spirits to the slave; and the question is, whether such contract of sale, which is not completed by delivery, is indictable. It is contended that it is; that the statute of 1842, ch. 141, prohibits the sale of spirituous liquors to a slave, and makes such sale an indictable offence; that a delivery is not necessary to constitute a valid sale, but that upon a contract to sell for a price agreed upon, the sale is good, and may be enforced upon

[Pulse vs. The State.]

the payment or tender of the consideration, though no delivery have been made. This reasoning is true in the abstract, but to apply it to the one under consideration, would be *reductio ad absurdum*: the principle is only applicable to cases of legal contract, which can be enforced in courts of justice. Here there is no such contract, because, 1st. It is made with a slave who has no power to contract; and 2d. It is made in direct violation of the provisions of the statute; it is therefore void and no contract at all. Again: the evil intended to be suppressed by the statute, was the consumption of spirits by slaves, to the detriment of their moral character, and the danger of the peace of the community. A contract of sale without a delivery could by no possibility be attended with any such evils, nor any other within the meaning and perview of the law. But lastly, the statute provides, that the offence shall be indictable, though the spirits sold be not drank nor intended to be drank at the place where sold. How they could be drank, or be intended to be drank, at the place where sold or drunken without a delivery, we cannot understand.

Upon the whole view of the case, then, we are of the opinion, that it is the fair and legal construction of the statute, that a contract to sell spirits to a slave, which is not completed by delivery, is not indictable under its provisions.

Judgment reversed, and case remanded for a new trial.

NOTE.—See *Goodwin vs. Smith*, 3 Hump. 542.

TAYLOR vs. TAYLOR et als.

A joint action lies, by statute law, against surviving obligor, and the personal representative of a deceased obligor, and it makes no difference whether the surviving obligor or some third person be the representative,

This is an appeal from the Circuit Court of Grainger.

J. A. McKinney, for the plaintiff in error.

R. J. McKinney, for the defendants in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt, brought by the plaintiff against Erika A. Taylor, in his own right, as surviving obligor, and against him and Daniel C. Carmichael and Henry Mayes, administrators of James Mayes, a deceased co-obligor with Erika A. Taylor. The defendants demurred to the plaintiff's declaration, upon the ground of a misjoinder of parties, an action against Erika A. Taylor, in his own right as surviving obligor, and against him as a personal representative of a deceased co-obligor, not being maintainable. The demurrer was sustained by the Circuit Court, and thereupon an appeal, in the nature of a writ of error, was prosecuted to this court.

That the principle as contended for in this case, by the defendants in error, is well settled at common law, admits of no controversy. But the act of 1789, ch. 57, sec. 5, has introduced a new rule of action upon this subject. That statute provides, that "whereas, it is a rule of the common law, that in case of the death of a joint obligor, the debt can never survive against his heirs, executors or administrators, which rule is frequently injurious and oppressive to the surviving obligor or obligors; to remedy which, in case of the death of one or more joint obligors, the debt or contract shall and may survive against the heirs, executors and administrators of the deceased obligor or obligors, as well as against the survivor or survivors." It has been invariably held, since the passage of this act, that under its provisions a joint action may be maintained against a surviving obligor, and the personal representative of a de-

[Davis' ex'rs vs. Roberts et als.]

ceased one. And it can, in our opinion, make no difference, whether the surviving obligor be such representative or some third person, the principle being alike applicable in either case, and of as easy applicability in the one as the other. See the case of *Simpson & Choat vs. Young and others*, 2 Hump. 514.

We are, therefore, of the opinion, that the Circuit Court Judge erred in sustaining the demurrer, and reverse the judgment.

DAVIS' ex'rs vs. ROBERTS et als.

If objection be not made to an incompetent witness when presented in the Circuit Court, the objection is waived.

This was an issue of *devisavit vel non* tried by Judge Cannon, and a jury of Hamilton county, at the March term of the Circuit Court in 1844.

The heirs of Davis, deceased, offered Elizabeth Davis, the widow of the deceased, as a witness, she having previously executed a release in the following words:

"I do hereby release to the heirs or devisees of James Davis, deceased, all interest I might or could have by the laws of distribution in the estate of said James Davis, or by any provision that might have been made to me by the present will in contest in the Circuit Court of Hamilton county, or by any former will made by said James Davis, deceased."

This witness was examined without objection on the ground of her interest in the estate, and a verdict was rendered in favor of the heirs, setting aside the will. A motion for a new trial was made and overruled, and judgment rendered. The executors appealed.

In the Supreme Court it was contended that the court below should have granted a new trial, on the ground, that the evidence of Elizabeth Davis was illegal, "because the release executed by her does not expressly release her right of dower."

[Hodges vs. The State.]

By the Court. The release is sufficient, and includes her right of dower: moreover, objection to her competency not having been made *on this ground* in the Circuit court, cannot be made now. Had objection been made, that the release was not sufficiently comprehensive in its language to embrace her right to dower, that objection could and probably would have been obviated by the execution of another.

Thompson and Lyon, for plaintiffs.

Trewhitt and Gaut, for defendants.

NOTE.—See *Richmond vs. Richmond*, 10 Yerger, 343.

HODGES vs. THE STATE.

The transmission of a sealed letter by mail, containing libellous matter is indictable. The indictment must charge, that it was sent with the intention of provoking a breach of the peace. ●

Rose prosecuted Hodges by indictment, in the Circuit Court of Claiborne county, for a libel, which charged Rose with lying and perjury.

The indictment charged, that Hodges "did write and publish a false and malicious libel, in the form of a letter, directed to the said George W. Rose, containing diverse false and scandalous matters and things of him the said Rose, which said libel is of the tenor and to the effect following, to wit," &c. &c. The indictment sets out the libel without more, and concludes in the usual form.

The defendant pleaded not guilty, and the issue thereupon was tried by Judge Robert M. Anderson, and a jury, at the November term, 1842.

It appeared that the prosecutor took a letter out of the post office at Tazewell, in the county of Claiborne, addressed to him, post marked 'Miltonville, N. Carolina,' which he exhibited

[Hodges vs. The State.]

to several persons, who read it. It was in the hand writing of the defendant. The letter contained the charges against the prosecutor set forth in the indictment, and was sealed up when he took it out of the post office.

Judge Anderson charged the jury, that if the defendant sent by mail a libellous letter, sealed up, directed to the prosecutor, and the prosecutor received it, this amounted to a publication at the place where he received it; and that if defendant wrote a libellous letter in North Carolina, and it was published by the reception of it in Tennessee, this would sustain the indictment. It was not necessary it should have been written in Claiborne county. The jury found the defendant guilty. The defendant moved the court for a new trial, which being overruled, and the defendant fined \$25, he appealed.

S. R. Rodgers, for the plaintiff in error.

There was no publication of this libel shown in proof. The transmission of a letter sealed up, by mail, which contains a charge of a crime or other libelous matter, to the person charged therewith, is not indictable on the ground of injury done by publication; for there is no publication by the act of sending. It is indictable on the ground of its tendency to produce a breach of the peace. The indictment must charge in such a case, that the transmission was with a view to provoke a breach of the peace. This has not been done, and the evidence does not sustain the indictment.

See 2 Chitty C. L. 888, 889, 876. Roscoe, 606. 2 Yerger, 581. 1 Russell, 212, 213.

The *Attorney General*, on behalf of the State, submitted the case to the court.

TURLEY, J. delivered the opinion of the court.

This is an indictment against Hodges for a libel, for which he was tried and convicted. The proof establishes the fact, that the libel complained of was written by the defendant, and sent to the prosecutor, Rose, through the post office. It does
15—VOL. V.

[Hodges vs. The State.]

not appear that there was any publication of this libel to a third person; and the indictment contains no allegation, that the intention of the defendant, in sending the letter, was to provoke the prosecutor to a breach of the peace. The Judge charged the jury, that "if defendant sent, by mail, a libellous letter, sealed up, directed to the prosecutor, and the prosecutor received it from the post office where he resided, that this amounted to a publication in law." This charge is erroneous. The reception of a libellous letter, which has not been read or heard by some third person, is no publication of a libel, though the offence of sending a libellous letter is indictable, provided the bill of indictment allege, that the intention of sending it was to provoke a breach of the peace. In Hawkins, vol. 1, ch. 28, sec. 11, it is laid down, that though there be no publication, yet the sending a letter to the party himself, filled with abusive language is indictable, because it tends to a breach of the peace, in order to revenge the insult received. In 2 Starkie's Rep. 243, it is held, that "if there be no publication to a third person, the indictment must allege an intention to provoke a breach of the peace." 3 Chitty Criminal Law, 871. The proof then in this case did not support the bill of indictment. The charge of the Judge upon the law, as to publication, was erroneous, and a new trial should have been awarded.

Let the judgment be reversed.

HANSARD vs. THE STATE.

The prosecutor is no party to the cause, and is not liable in any case for costs, unless it be so directed by statute.

Hansard prosecuted Sawyers in the Circuit Court of Claiborne county, for a felonious assault. Sawyers was acquitted, and the defendant's attorney moved the court, R. M. Anderson, Judge, presiding, to tax the prosecutor with the costs. This the court refused to do, but taxed him with the costs of three witnesses. The prosecutor appealed.

Peck, for the plaintiff in error.

The prosecutor is not a party. The acts of the legislature specify two cases only, in which the court may tax him with costs, to wit, where the prosecution is *malicious* or *frivolous*. The court has no power on this subject, except what is conferred by statute. Nic. & Car. 191.

Attorney General, for the State.

In such an interlocutory motion, like the present, the court need not set forth the grounds of its action or the evidence on which such adjudications are based. Its action is presumed to be correct. If the appellant thinks it erroneous, he must show the error of the court by an exhibition of the facts. 4 Hump. *Simpson vs. The State*, 456. If it appears to the Circuit Judge, that the witnesses were summoned at the instance of the prosecutor, that he knew they had no knowledge of the facts in regard to which they were called to testify, and that the summoning of them was procured for the malicious purpose of oppressing the defendant with costs in the event of his conviction, and of throwing it on the State in the event of an acquittal, it is clear that the court had before it *a case of abuse of its process* by the prosecutor. It is true the prosecutor is not technically a party to a State prosecution, yet he is the instrument by which the prosecution is set on foot; his name necessarily, in all cases, must be placed on record. He is *in fact*, for some purposes, a party of record. At common law the King paid no costs, and recovered none. The prosecutor paid his costs

[Hansard vs. The State.]

in the event of an acquittal, and in the event of either acquittal or conviction the defendant paid his costs. See *Chitty*, vol. 1, 824, 829: *Hulloch on Costs*, 601 to 607. See *Barton vs. State*, 3 Hump. It is only in specific cases, now provided for in England, that the King pays prosecutor's costs. It is insisted that the power exists in the courts of Tennessee, without the aid of a statutory provision to tax the prosecutor with the costs, where it appears that he has maliciously prosecuted the suit, as well as where he has maliciously instituted it. It will aid the court to protect, by immediate action, the defendant or the State, as circumstances may require, by throwing upon the prosecutor costs which have been illegally and maliciously accumulated. It would be strange that the court should have the power to tax the prosecutor with the whole of the costs where they have been maliciously created, and yet not have the power to tax him with a part under the same circumstances.

GREEN, J. delivered the opinion of the court.

Thomas L. W. Sawyers was indicted in the Circuit Court of Claiborne county, for a felonious assault, and the plaintiff in error was prosecutor. Sawyers was acquitted, and a motion was made to tax the prosecutor with the costs. The court discharged the motion to tax the prosecutor with the costs generally, but because it appeared to the court that several witnesses who had been summoned for the State, knew nothing about the case, his Honor ordered and adjudged that the prosecutor should pay the costs of said witnesses. From this judgment Hansard appealed to this court.

A prosecutor is no party to a cause, and is not liable for costs in any case, except as that liability may have been created by statute. The act of 1794, ch. 1, sec. 76, and 1807, ch. 24, sec. 1, provide that if the defendant shall be acquitted, and the court shall be of opinion that the prosecution was malicious or frivolous, it may tax the prosecutor with the costs. The only case in which the prosecutor can be taxed with costs, is that specified in these two acts, namely, where the prosecution is

[Wade et al. vs. Johnson.]

malicious or frivolous. But in this case, the court adjudged that the prosecution was not frivolous or malicious, so as to justify a judgment against the prosecutor under these acts. But for a reason not mentioned in either of these statutes, the prosecutor is adjudged to pay part of the costs. This we think the court had no power to do.

Let the judgment be reversed.

WADE et al. vs. JOHNSON.

1. A widow is not a competent witness in a suit by the heir for a portion of the real estate of her deceased husband, where a recovery by the heir would increase her dower interest, or a loss reduce it.
2. Where a tract of land belonging to tenants in common, has been adversely held for the period fixed by the statute of limitations, and some of these tenants in common have been of age during such adverse possession, and others not, it is held, that the interest of each tenant is barred or otherwise, as he may be within or without the saving of the statute.
3. Where a portion of a tract of land, owned by tenants in common, had been adversely held, until the rights of all, except one, who was a minor during such adverse possession, was barred. It is held, that the assignment by judicial partition, of the part so adversely held, to the minor, would not vest him with the entire interest therein, but only his aliquot share thereof.

Wade and wife instituted this action of ejectment in May, 1842, against Johnson, in the Circuit Court of Anderson county. The case was tried by Judge Cannon and a jury in 1844.

It appeared in evidence, that W. Lamar died in possession of a tract of land, of which the tract of one hundred and twenty-six acres in controversy was a part; that he left a widow and thirteen children, of which Ann Wade was one; that in 1831, Charles Lamar took possession of one hundred and twenty-six acres of the tract, by virtue of a deed of conveyance, and he and Johnson had held continued adverse possession of it from that time till the institution of this action; that in 1841, the widow and heirs of W. Lamar instituted by petition proceedings in the Circuit Court of Anderson county, by which dower was allotted to the widow, and the balance of the land divided into nine lots, and lot No. six, containing one hun-

[Wade et ux. vs. Johnson.]

dred and twenty-six acres, now in controversy, in the possession of Johnson, was assigned to Ann Wade. All the heirs were barred by the statute of limitations, except Ann Wade and another. A portion of the above facts were proved by the widow of W. Lamar. Her testimony was objected to by the defendants, but the objection was overruled.

A verdict and judgment were rendered in favor of the plaintiffs. The defendant appealed.

Rodgers and Crozier, for the plaintiff in error.

Lyon, for the defendants in error.

REESE, J. delivered the opinion of the court.

The wife of the plaintiff below, is one of the children, and heirs at law of William Lamar, deceased. There were eleven other children and heirs at law of the said William Lamar, all of whom, except two, had arrived at majority more than three years before the bringing of this suit. The defendant and those under whom he claims, had an adverse and continued possession of the land in dispute, commencing in 1831, claiming against all persons the land in dispute, under and by virtue of their deeds of conveyance. In 1840, when nine-twelfths of the heirs of William Lamar, deceased, were barred as to the land in dispute by the adverse possession of the defendant, the said heirs instituted certain proceedings, by which they caused certain commissioners, for that purpose appointed, to make partition among themselves of the entire real estate descended to them from their ancestor, William Lamar, and caused the land in the possession of the defendant, and adversely claimed by him, to be assigned and partitioned off to Ann Wade, the plaintiff below, as lot No. 6 in said partition, for her several and separate portion of the real estate of the said William Lamar.

Under these circumstances, the material question upon the trial of this cause was, whether Mrs. Wade was entitled to recover or to be let into possession of one-twelfth of the land sued for in this action, or of the entire lot No. 6, set forth in the record of partition.

[Wade et al. vs. Johnson.]

It has always been held in this State, that if one or more of many tenants in common of real estate be barred by the statute of limitations, and others be within the saving of the statute, it shall not operate against those who are within the saving of the statute to bar them; nor shall the partition given by those within the saving of the statute, prevent the operation of the bar as to those without the saving of the statute; but each one shall recover or be barred as to his aliquot share or portion of the land as he may be within or without the saving of the statute. Thus, if all these heirs had joined in the demise in this action, nine of them would have been barred according to the proof. See *Barrow vs. Nave*, 2 Yerg. Rep. 227. If the heirs remain in possession of a part of the land descended to them, and permit adverse possession to be taken of a part by a stranger, and it be continued till a portion of them are barred, can they afterwards, by release or other conveyance, so arrange the matter as to throw the claims of the heirs, when within the saving of the statute, off the portion of which they are in possession, and enable them by their conveyance to do what they themselves could not do, recover upon a several claim the entire land adversely held?

In this case, for instance, if at the end of the year 1840, or the beginning of 1841, the heirs, instead of the proceedings in the record of partition set forth, had each released his share to Mrs. Wade, by deed, such share being then barred by the adverse possession, and by the statute, would their bargainee or releasee have been, by the operation of such deeds, in a better condition than if they had sued themselves?

It will scarcely be so contended. And yet such deeds would have been entitled to all the legal effect which can be claimed for the act of the commissioners in the judicial proceeding for partition. The situation of Mrs. Wade, by the saving of the statute, was better than that of the other heirs, at the time this suit was commenced, to this extent, that she was entitled to the one-twelfth of lot No. 6, in the adverse possession of the defendant, and also to the one-twelfth of all the other lands descended from the ancestor, while the others were entitled to nothing in lot No. 6. so far as in possession of the defendant,

[Haynes vs. The State.]

and only to the eleven-twelfths of the balance; and under such circumstances, they will not be justified to escape from their laches and enlarge their interests by throwing the claim of Mrs. Wade entirely from themselves, and giving her twelve-twelfths of that in which they had ceased to have any valid title or claim.

As his Honor, the Circuit Judge, charged upon this point contrary to these views, the judgment of the Circuit Court will be set aside, and a new trial be had. It results, also, from this view of the case, that the dowress of William Lamar was not a competent witness; because her dower was assigned in 1840, upon the basis of the statute not having operated as a bar upon any portion of the estate, and she has a direct interest opposed to the reassignment and curtailment of her dower.

HAYNES vs. THE STATE.

The provision of the act of 1837-8, ch. 137, sec. 2, which directs the imprisonment of persons convicted of wearing concealed under their clothes knives, which in form, shape or size, resemble bowie knives, is not void on the ground, that it is too indefinite to be safely executed. The intent of the Statute was to prevent the destruction of human life by the use of heavy and dangerous knives, and it is the province of the judge and jury to determine what description of knives are embraced by the spirit of the statute.

Stephen Haynes was indicted in the Circuit Court, held for the county of Knox, at the February term, 1843.

The indictment charged him, 1st. With having worn a bowie knife concealed under his clothes; and 2dly. With having worn concealed under his clothes a knife in size resembling a bowie knife.

He was tried by Judge Cannon and a jury of Knox county, at the June term, 1844.

It appeared that Haynes was arrested for an affray, and being required to give sureties for his appearance at court, to answer for the offence, attempted to make his escape. In the scuffle which ensued the constable took a knife from Haynes, which was concealed under his clothes.

[Haynes vs. The State.]

Witness, *Booth*, said the knife was from fifteen to eighteen inches in length.

Jackson said it was a large knife. It was what he called a bowie knife. He had seen bowie knives of different sizes, some larger and some smaller than the knife which Haynes had.

Bowen saw the knife when it was taken from Haynes. He said, he took it to be a bowie knife, and was what he had heard called a bowie knife,

Harris said he was acquainted with bowie knives; that bowie knives were generally larger than the knife which Haynes had. He had seen them of different shapes and sizes; that they were used for chopping or hacking, though they might be used for thrusting; that the knife in question was what was called a Mexican pirate knife, but that it might be said to resemble a bowie knife, because it had a sharp point, a thick back and a sharp edge.

Bell said he was acquainted with bowie knives and pirate knives; that they differ in size and shape from each other; that the bowie knife is much the largest; that bowie knives are made of different sizes and shapes, but are broader and heavier than the pirate knife.

Nelson said, that there was no general resemblance between the bowie knife and a pirate knife; that the knife which Haynes had, was a pirate knife. He never saw a bowie knife as small as the knife in question. The pirate's knife was slim and pointed, the bowie knife broad and heavy.

The jury under the charge of the Circuit Judge, which was not set out in the bill of exceptions, acquitted the defendant on the charge of wearing a bowie knife, but found him guilty as charged in the second count, of wearing a knife in size resembling a bowie knife.

The defendant moved the court for a new trial, and presented in support of the motion his own affidavit, and those of others, to show that the knife in question was a Mexican pirate's knife, &c. &c.

The motion was overruled, and defendant sentenced to imprisonment in the common jail of Knox county.

From this judgment he appealed.

[Haynes vs. The State.]

Swan and J. Nelson, for the plaintiff in error. .

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an indictment against Stephen Haynes, the plaintiff in error, under the act of 1837-8, ch. 137, passed to prohibit persons from wearing under their clothes or concealed about their persons, any bowie knife, Arkansas tooth pick, or other knife or weapon in form, shape or size, resembling such bowie knife or Arkansas tooth pick. The bill of indictment contains two counts. The second, upon which the conviction took place, charges, "that the defendant, with force and arms, did unlawfully wear a knife in size, resembling a bowie knife, concealed under his clothes."

The design of the statute was to prohibit the wearing of bowie knives and others of a similar description, which the experience of the country had proven to be extremely dangerous and destructive to human life; the carrying of which by truculent and evil disposed persons but too often ended in assassination. To have undertaken a war against the name of the knife, the legislature were aware would have been useless and unavailing, as it could and would have been changed for the emergency as often as legislative provisions might make it necessary; therefore, it is the thing that is provided against, not the name, it being equally dangerous, either as bowie knife, Arkansas tooth pick, Mexican pirate knife, *aut quocunque nomine gaudet*. The act, therefore, wisely provides against bowie knives, Arkansas tooth picks, or any other weapon in form, shape or size, resembling them. But it is argued, that this is too indefinite; and that absurd consequences must follow its enforcement, for a small pocket knife, which is innoxious, may be made to resemble in form and shape a bowie knife or Arkansas tooth pick, the carrying of which, under the words of the statute, would subject the offender to its penalties. To this it is to be answered, that the carrying of such a knife is not within the evil intended to be remedied by the statute, and that

[Haynes vs. The State.]

though within the words, it is not within the spirit and meaning of the law, that statutes of this character though strictly construed in favor of offenders, as being highly penal, are not construed according to the letter, but according to their spirit, for the purpose of suppressing the evil, and are like the statute spoken of by Blackstone in his Commentaries, which inflicted the punishment of death upon any individual who should draw blood in the streets, which he holds by a legitimate construction, not to apply to the case of a physician who should open a vein for an invalid in the streets, it not being within the spirit and meaning of the statute, though within its letter. So of the statute under consideration. The design, meaning, and intent was to guard against the destruction of human life, by prohibiting the wearing, heavy, dangerous, destructive knives, the only use of which is to kill; and to hold that it applied to knives used altogether for lawful purposes, and such as peaceable persons, not given to brawling and stabbing, carry in their pockets, would be a violation of sense and of every rule of construction as applicable to statutes of this kind. The maxim, *qui hæret in litera, hæret in cortice*, is as well applicable to penal statutes as to remedial.

But it may be asked, what is to protect against conviction, when the words of the statute cover the charge, and its true spirit and meaning does not?

We answer, the judge and jury who try the case. We cannot presume that the latter would find, or the former permit a verdict to stand, where the offence charged was not of the character designed to be prohibited by the statute.

On the trial of the case, two knives were produced, one is admitted to have been a bowie knife, the other is called by some of the witnesses a Mexican pirate knife; they are both shown to be heavy, deadly weapons, as the name of the latter clearly indicates; there is some difference in the shape, and the bowie knife is the largest; the proof shows that bowie knives are of different sizes, according to the fancy or strength of the person who may design to wield them, but all and every one of them calculated to produce death at a blow; so is the Mexican pirate knife, which does in size resemble a bowie knife, which it may

[Haynes vs. The State.]

do without being actually as heavy or as large as a bowie knife. The knife produced on the trial and called a Mexican pirate knife, which is the knife found upon the prisoner, is shown to have been of a very deadly character; such an one as by unskilled individuals, would be called a bowie knife, (as it was by some of the witnesses,) but by connoisseurs a Mexican pirate knife. The jury therefore did not find the defendant guilty of carrying concealed a bowie knife, but a knife in size resembling a bowie knife, and we think the testimony well warranted the verdict.

Some affidavits have been introduced on the motion for a new trial, but they only go to the facts, of the name of the knife, viz, Mexican pirate, and that such was the knife taken from the defendant. These facts, if proven as stated in the affidavit, would not change the merits of the case, the jury having found the defendant guilty, not of carrying a bowie knife, but a knife in size resembling a bowie knife, which the pirate knife does. This testimony, therefore; could not vary the verdict, as it is found upon the very same facts disclosed in the affidavit.

We, therefore, affirm the judgment of the Circuit Court.

KENNEDY vs. WIGGINS.

1. The act of 1837, ch. 2, does not confer a right of preference of entry on a possession of land in the Ocoee District by agent or servant. The land must be the residence and domicile of the party claiming the right.
2. Wiggins took possession of land in the Ocoee District by his agent, Pike, who was residing on the land at the time of the passage of the act authorizing occupant preferences. Pike sold his right. Held, that his assignee was entitled to the land, there existing no legal obligation between Pike and Wiggins on the ground of tenancy, and Pike being the actual resident,

This bill was filed by Kennedy, in the Chancery Court at Cleaveland, against Wiggins, to vacate a grant which Wiggins had obtained from the State, for one hundred and sixty acres of land lying in the Ocoee District. It was heard on bill, answer, replication and proof, by Chancellor Williams, at the September term, 1842. He granted the relief prayed for, and a decree was entered accordingly, from which the defendant Wiggins appealed. All the material facts are stated in the opinion of the court.

Gaut, for the complainant.

Van Dyke, for the defendant.

GREEN, J. delivered the opinion of the court.

The defendant Wiggins proved a preference right to the south-west quarter of the thirty-fourth section of the second fractional township south, in the second range east of the basis line in the Ocoee District; on the 5th of August, 1839, he made an entry of said quarter, and obtained a grant the 17th of September.

Henry Pike also proved a right of occupancy for the same quarter section, which he transferred to the complainant John Kennedy, who tendered a location and the requisite sum of money therefor to the entry taker the 17th of August, 1839; which was refused by the entry taker, on the ground that the same land had been previously entered by Wiggins. Kennedy thereupon filed this bill, alledging that Wiggins had no right of occupancy to the land in question; but that Pike, his assignor,

[Kennedy vs. Wiggins.]

was the true occupant; and praying that the legal title which Wiggins had acquired be vested in the complainant, on the payment of the purchase money, expenses, &c.

1. Our first enquiry is, whether Wiggins was entitled to enter the land in controversy, as an occupant.

The act of 1837, ch. 2, confers a right of preference or priority of entry on every person (except Cherokee Indians) who was "in the actual possession of, and residing upon any piece of vacant and unappropriated land in the Ocoee District," at the time of the passage of that act.

The only question then is, whether the defendant was in possession of, and residing on the land in controversy on the 29th of November, 1837, the day the act was passed.

The whole body of evidence concurs in establishing the fact, that at the time of the passage of the act, Wiggins's residence was in McMinn county, some forty miles from the land in dispute. Some time in 1836, he had caused an improvement to be made at the place in controversy, by clearing a field and building some cabins; and he brought to the place, whisky, bacon and flour, which he kept there for sale. Much of his time was occupied at this place in vending these articles; and when he would return to McMinn county, where he had a farm, on which his family continued to reside, other persons were employed to sell for him; and thus, by means of his agents, stock and property, he continued in possession of the premises, until after the passage of the law disposing of the Ocoee lands. But although thus in possession, his *residence* was never changed from McMinn. His family continued there, the bulk of his property was there, and his own time was passed alternately at the one place and then at the other. To *reside*, means to dwell permanently, or for a length of time, to have a settled abode for a time. Now there can be no doubt but that the domicile, the settled abode, the residence of Wiggins, on the 29th of November, 1837, was in McMinn county, where his family then were: and he himself so considered it; for in 1838, being summoned as a garnishee before a magistrate in the neighborhood of this improvement, he claimed his attendance as a witness in the cause as an inhabitant of McMinn county.

[Kennedy vs. Wiggins.]

As Wiggins had no personal residence on the place in controversy, the fact of his possession of the place by agents, servants, or tenants, could give him no right of occupancy which would confer a preference of entry. The act of assembly confines the benefit to him who was a personal *resident*, and does not confer it upon the mere possessor of land. The residence, therefore, of servants, or agents, conferred no preference of entry on the principal.

2. The next question is, whether Henry Pike, under whom the complainant claims, was entitled to a preference of entry by virtue of his residence on the land.

It appears from Wiggins's answer, and from the proof, that Pike was employed by Wiggins in 1837, to live on the place in controversy, and sell his provisions for him, when he was absent; and that Pike cultivated a field of six acres that he rented from Wiggins. Pike, with his family, was thus residing on the land when the law of 1837 passed. It is plain, therefore, that he was residing on the land, within the letter of the law; and so far as all others (except Wiggins) were concerned, he was clearly entitled to a preference of entry: nor could his relation to Wiggins, as tenant, affect his right. Before the passage of the act to dispose of these lands, all persons residing on them were trespassers on the public domain; but the State chose to confer a benefit upon those who were thus residing and in possession, by giving them a preference of entry. Those who were not residents were excluded. It is clear, therefore, that the existence of the right on the part of him who was a resident, could not affect the rights of him who was not a resident. Wiggins not being a resident, had no right of occupancy; and therefore his rights could not at all be affected by the fact, that Pike claimed a right of occupancy. There was therefore no bad faith towards Wiggins in setting up this claim by Pike, that should repel him or his assignee from this court. In order that the principle insisted on should have application, it is necessary that Pike should have violated some obligation of honor, of faith, of allegiance, toward Wiggins. But this cannot be the case, seeing that Pike's claim interferes with no benefit Wiggins could have derived under the law.

[Kennedy vs. Wiggins.]

We therefore think the complainant was entitled to a preference of entry as Pike's assignee, and that the legal title should be divested out of Wiggins and vested in him on the payment of the purchase money and expenses, and the value of Wiggins's improvements. Affirm the decree.

NOTE.—*Occupancy—Possession—Residence.*—GREEN, J. delivered the following opinion in the case of Kenner vs Montcastle and others, at this term.

In this case, the question that embarrassed the Chancellor, and which constituted the issue submitted by him to the jury, is, whether the complainant was in possession of, and residing on the land in controversy, when the law passed to dispose of the Ocoee lands, in his own right and for himself, or as the servant of Montcastle. The 5th section of the act of 1837, ch. 2, requires, that a party, to be entitled to a right of occupancy, should have had both *possession of* and *residence on* the land at the time of the passage of the act. Neither *possession* nor *residence* taken alone will do. Both must concur. A party may have been in possession by his slaves or servants, and not a resident, in which case he was not entitled to a preference of entry. So he may have been *resident* on an improvement as the servant of another; in which case he would not be *possessor*, and consequently not entitled to a right of occupancy. A servant acting as such, and laboring on wages for another, cannot be said to be in possession of the farm on which he labors. It would be different if he were a tenant, as was the case with Pike, in *Kennedy vs. Wiggins*. In that case, Wiggins had rented six acres of the land to Pike; who being thus in possession *for himself*, though as Wiggins's tenant, was held to be entitled to an occupancy. In this case, the jury found that the complainant was in possession of the land in his own right, and residing thereon at the time the law passed. The Chancellor decreed in accordance with this verdict; and we think the weight of the evidence is in favor of the decree. Kenner and Montcastle were partners in merchandise, doing business in a storehouse on the quarter section in controversy. Kenner was a young man without family, did business in the store during the day, and slept in the storehouse at night; but he ate his meals at the house of Montcastle. We think the facts constitute him a resident at the store. He certainly had a residence; and if the store was not the place, the house of Montcastle must have been. But shall we say that a place where he spends a half hour three times a day, merely to take his food, shall be his residence; and that the place where all his work during the day is performed, and where he sleeps during the night, is not his residence? This cannot be insisted upon. The argument then that denies him a residence at the store, in effect denies him any residence whatever. But it is said, Montcastle sold this improvement as partnership property. We think a right of occupancy cannot exist in partnership; that Montcastle as partner had no right to dispose of Kenner's rights, acquired by his personal residence and possession of the storehouse; and that, as Kenner refused to join in the sale, his rights are not prejudiced thereby; nor has he been guilty of any bad faith towards the purchaser, that shall repel him from a court of chancery.

Bradford and Torbat, for complainant.

Van Dyke and Gout, for defendant.

CRIPPEN, guardian, vs. BEARDEN & ODELL.

1. An administrator is bound to act on the legal rights of his intestate.
2. A verbal gift of a slave is utterly void as between donor and donee.
3. A verbal contract for the sale of real estate is void, and can be made valid by no act of part performance. Money paid on such contract, is regarded as a mere deposit for the use of the party paying it.

This case was tried by Chancellor Williams, on bill, answers, replications and proof, at the April term of the Chancery Court in Knox in 1843, and a decree rendered in favor of the complainant, from which the defendants appealed.

Crozier and Lyon, for complainant.

Rodgers, for defendants.

GREEN, J. delivered the opinion of the court.

This bill is filed by the widow, and infant children, by their guardian, of Samuel Odell, deceased, against the administrator Bearden, charging that through fraud or negligence he had failed to collect debts due the estate, and particularly the sum of 660 dollars which Samuel Odell in his lifetime had paid to William Odell upon a verbal contract for the purchase of a tract of land, and which said administrator was bound to have recovered back from the said William.

William Odell is also made a defendant; and he denies, in his answer, that Samuel Odell ever paid him any money for the land.

The facts, from all the proof, appear to be, that in 1834 or 1835, William Odell, the father of Samuel, sent a negro girl named Amy, to his son Samuel's house, where she remained about two years serving Samuel, and being treated by him as his own slave, and being understood and considered among the neighbors as his property. In the spring of 1836, Nicholas B. Swan went to William Odell's to see if he had any negroes to sell; but learned from him that he did not wish to sell any, but said his son Samuel Odell had some to sell. He went to Samuel Odell's and purchased from him the negro girl Amy and

[Crippen, guardian, vs. Bearden & Odell.]

her child for 660 dollars. Samuel had no pen and ink, and the parties went to William Odell's, where a bill of sale was prepared, and executed by Samuel Odell in the presence of his father, the said William. These 660 dollars, Samuel Odell received from Swan, and paid to his father on the verbal contract for the land. The old man recognized it as a payment, saying at one time he had received 660 dollars in part pay for the land,—and at another time, that he had a mind to make Samuel's heirs pay up the balance, and take the land. Several witnesses prove that he said he had given the negro girl to Samuel, and that he had received from Samuel the 660 dollars for which the girl sold, in part payment for the land.

Upon these facts, the first question is, did the money for which the girl Amy was sold, belong to Samuel Odell.

It is contended by the defendant's counsel, that as by the act of 1831, a gift of a slave is void unless it be in writing, the verbal gift in this case, of the negro to Samuel Odell, communicated to him no title, and that when the girl was sold the money belonged to William Odell, and that his reception of it from Samuel was no payment on the contract for the land.

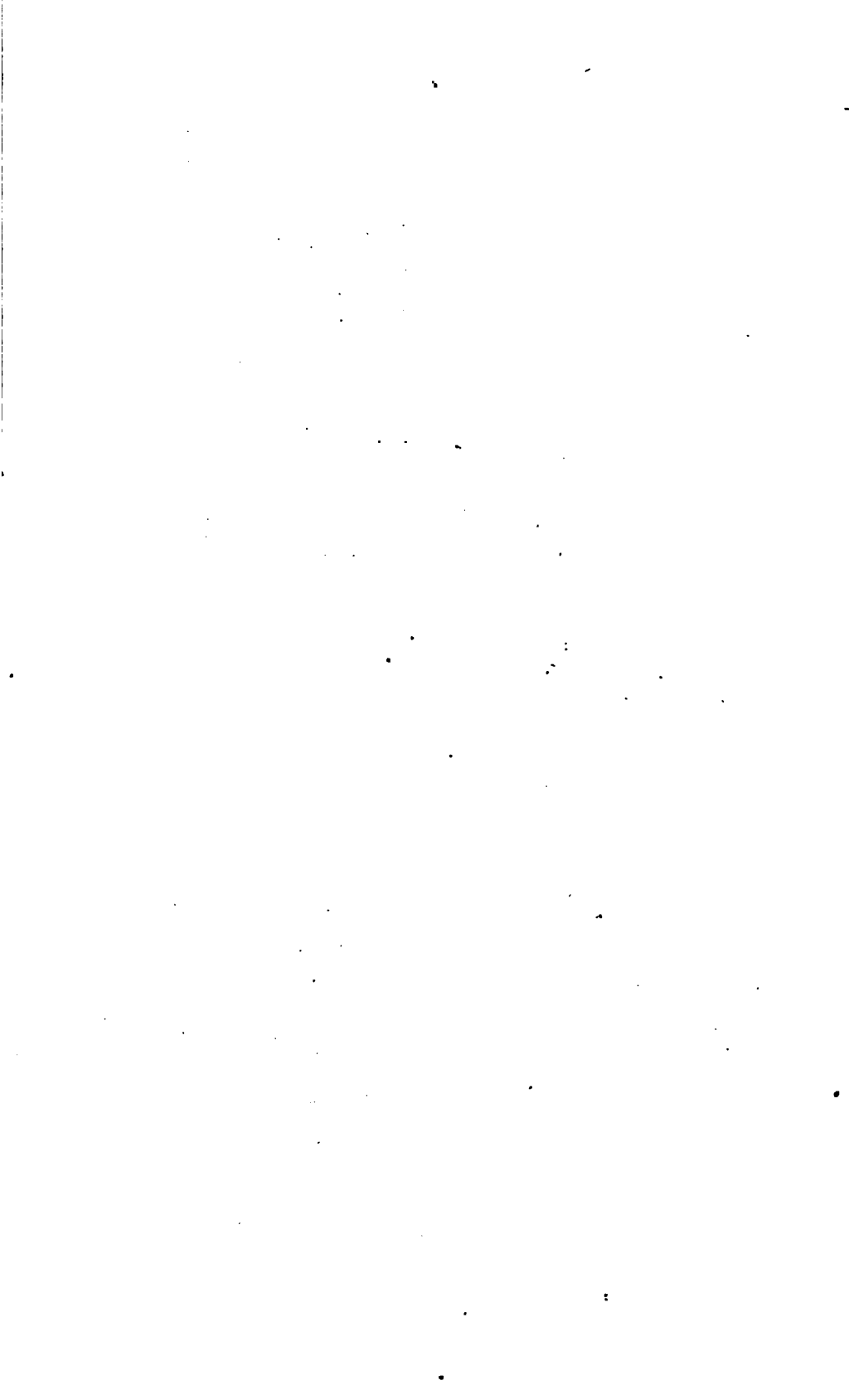
It is true this court holds that a verbal gift of a slave is utterly void, even as between donor and donee, (*Neely vs. Wood*, 10 Yer. R.) but in the present case, the question is not as to the legal ownership of the negro, but whether the money for which she sold did not belong to Samuel at the time William Odell received it. And in this view of the case, the manner in which the parties had treated the negro, the understanding they both had, that Samuel was owner, enable us to perceive clearly, that they both must have regarded the money as belonging to Samuel; and so regarding it, he became *in fact* the owner. The payment therefore, upon the verbal contract for the land, was a reception of so much money by William Odell, to the use of Samuel. This court has held, that money so deposited may be recovered in an action of assumpsit. This is a legitimate consequence of the doctrine of this court in relation to the statute of frauds. We hold that a verbal contract for the sale of land, is utterly void, and can be made binding by no act of part performance.

[Crippen, guardian, vs. Bearden & Odell.]

There can be no obligation on the part of either party to go on with the contract; and if money has been advanced, it will be considered as a mere deposit to the use of the party making it.

We think therefore the plaintiffs are entitled to a decree against both defendants for the 660 dollars, paid for the land, and interest thereon.

Affirm the decree.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

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**NASHVILLE: DECEMBER TERM, 1844.**  
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PERRY vs. PATTERSON.

1. Where a bill single was delivered to the creditor by an obligor as surety, upon condition that another should sign as co-surety, it was delivered as an escrow, and is not obligatory unless the condition be complied with, or unless he agreed that it should be obligatory on him after his knowledge of the refusal of the other to sign as co-surety.
2. Where a bill single was delivered as an escrow by a surety to the principal obligor and by the principal obligor to the creditor absolutely and without condition, the ignorance of the creditor does not discharge the condition and constitute the delivery a valid absolute delivery. It was the business of the creditor to have informed himself of the facts connected with the delivery.

The following is the decree entered in this case, which exhibits the grounds on which the Chancellor acted.

"This cause coming on for trial at the March term, 1844, of the Chancery Court at Columbia, before the Hon. Terry H. Cabal, on bill, answer, replication and proof in the cause, and it appearing to the court, that on the — day of —, 184—, Robert Patterson obtained, in the Circuit Court of Maury county, two judgments against William Perry, Jun. for something above the amount of \$1200; that said Patterson, by his attorney, agreed to give said Perry an extension of 12 months on said debt, by taking a new note with Simpson and Frank Perry as surety. It further appearing to the court, that said Simpson Perry did

[Perry vs. Patterson.]

agree to be the surety of Wm. Perry, Jr. on a note of \$1232 34, due 21st March, 1841, in conjunction with Frank Perry, in order to enable William Perry, Jun. to avail himself of the extension proposed by said Patterson, and did sign said note as said William Perry, Jun.'s. surety; which said note was afterwards delivered to said Patterson's attorney and accepted by him in satisfaction and payment of said two judgments, whereby Patterson waived the right and benefit of recourse on the lot of goods and negroes of said William Perry, Jun. which were claimed by Simpson and Frank, under an assignment from William Perry, Jun. for their benefit. The court being further satisfied, that said Simpson Perry, at the time he signed said note, was assured that Frank Perry would join and become co-surety on said note, and that said Simpson signed it under an agreement that he was to be responsible with Frank Perry as his co-surety. The court being further satisfied, that William Perry, Jun. and the complainant derived the same benefit from the note with the signature of Simpson's name as surety, which they would have done had Frank also signed it by said Patterson's attorney accepting it in payment of said judgments. And the court being of opinion, that, under these circumstances, complainant, as surety of William Perry, Jun. is justly bound to pay one half of said original note, with the interest thereon, to defendant Robert, and that said Patterson has a right in law to recover the same; but that complainant ought not to be bound to pay more than one half of said note, with the interest thereon. It is therefore by the court ordered, adjudged and decreed, that defendant be permitted to prosecute his suit at law to judgment; that after said judgment is recovered, one half of the amount be perpetually enjoined as to said Simpson Perry, and that Patterson be permitted and allowed to recover the other half of said judgment, with the interest thereon, and that execution issue therefor. It is further ordered, adjudged and decreed by the court, that complainant be enjoined from pleading *non est factum*, or that the instrument was delivered as an escrow, at law, the defence against said note properly arising under those pleas at law having been tried and settled in this court. It is further ordered, adjudged and

[Perry vs. Patterson.]

decreed by the court, that each party pay one half the costs of this suit, and that execution issue for the same as at law."

From this decree the complainant appealed.

Nicholson, for complainant.

W. H. Humphreys, for defendant.

TURLEY, J. delivered the opinion of the court.

Robert Patterson recovered judgments at the January term, 1840, of the Circuit Court of Maury, against Wm. Perry, for the sum of between eleven and twelve hundred dollars. Wm. Perry being in failing circumstances, a proposition was made to him by Patterson, through his attorney, that if he would give a note for the amount of said judgment, with two undoubted solvent sureties, he would give him twelve months longer time in which to pay the debts. This proposition was accepted, and the names of Simpson Perry the complainant, and Francis S. Perry, were to be procured as the sureties, and agreed to be received. A blank note was prepared, with three seals, for the purpose of being executed, by said Wm. Perry, Simpson Perry and Francis S. Perry, for the amount of the judgments, payable at twelve months.

W. Perry, after signing the note himself, presented it to Simpson Perry, for his signature, who expressly refused to sign it, until he was informed that Francis S. Perry was to do so likewise; he then agreed to sign it upon that condition, and did so,—placing the note thus signed in the hands of Wm. Perry to procure the signature of Francis S. Perry, before it was to be delivered to Patterson.

Francis S. Perry refused to sign it, and the note was delivered to the attorney of Patterson, with the signature of Simpson Perry alone as surety for its payment. It does not appear that the note was then received by the attorney in payment of the judgments; for he still insisted on having the two sureties as per agreement, and attempted, by executions on the judgments, to enforce a performance, but without success,—Francis S. Perry

[Perry vs. Patterson.]

remaining firm in his refusal to become bound for the debt. The executions were then returned, but not satisfied, the judgments being still kept open against Wm. Perry, and suit is commenced on the note against Simpson Perry, who thereupon files his bill of complaint, asking that the proceedings at law be enjoined, and the note delivered up to be cancelled.

This is resisted upon the alledged ground, that the note as executed was delivered to the attorney without any knowledge on his part that it had been conditionally executed only; and that, if the fact be so, Simpson Perry, the complainant, was afterwards informed that Francis S. Perry had refused to sign the note, and then, either expressly or impliedly, agreed that it might be considered as obligatory on him as it was.

That the note was delivered conditionally, and that Simpson Perry was not to be bound, unless Francis S. Perry also signed it, we think satisfactorily proved. This would constitute a delivery, as an escrow, and would not be obligatory upon Simpson Perry unless the condition were performed, or unless he agreed that it should, after he had been informed that Francis S. Perry had refused to become bound as his co-surety.

The law upon this point is settled beyond controversy, and needs at this day no investigation. And it makes no difference, though the attorney did receive the note without the knowledge that it had been conditionally executed by Simpson Perry; the note was not delivered to the attorney by him, and it was therefore necessary that he should have enquired as to the mode of the execution before he could claim to hold it, discharged from the creditor. But we think it obvious, from the proof, that the note was not delivered to the attorney, as an execution of the agreement between him and Wm. Perry, but merely lodged with him till such time as Francis S. Perry could be induced to sign it. If this were not so, why should the attorney have insisted that it was not executed in accordance with the agreement, and that he must have the two sureties? Why should he have refused to satisfy the judgments, and have endeavored to enforce their collection by execution? And why, when he found that this could not be done, were the executions merely stopped in the hands of the sheriff, and returned unsatisfied?

[Perry vs. Patterson.]

We are constrained to believe, that the note has been retained, as the last resort, after every other mode of enforcing payment of the judgments had failed.

Neither can we perceive from the proof, any reason for believing that Simpson Perry had any knowledge that the note had come into the hands of Patterson's attorney without the signature of Francis S. Perry, and of course cannot say that he ever agreed to be held singly bound as security for Wm. Perry in the amount of the judgments in favor of defendant. If he ever did, it is matter of proof, the burden of which lies upon Patterson; having failed to make it, he loses the defence.

Upon the whole view of the case, then, we are of opinion that complainant is entitled to the relief sought in this bill; that the proceedings at law be enjoined, and that the note be delivered up and cancelled.

Reverse the decree of the Chancellor, and decree accordingly.

NOTE—A bond cannot be delivered to one of the obligees as an escrow. 2 Condensed Reports, 277.

A bond may be delivered by the surety to the principal obligor as an escrow. 2 Cond. Rep. 92.

The bond on its face purports to be delivered absolutely, and it is not to be doubted the obligees would be more secure against fraud if the evidence that the writing was delivered as an escrow appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed. 2 Cond. Rep. 92.

THOMPSON *vs.* THE STATE.

1. Where spirituous liquor is sold by agent contrary to the statute, both principal and agent are guilty and liable to indictment. 2 Hum. 399.
2. The same strictness is not required either as to allegation or proof in prosecutions for misdemeanors as in those for felonies. 2 Hum. 313.
3. When a misdemeanor has been positively proved against an individual, the court should be slow in granting a new trial, to let in the defence of *alibi*, as it is subject to great abuse.

Thompson was tried by Judge Dillahunty and a jury of Maury county, for the offence of retailing spirituous liquors to a slave, and convicted. He was ordered to be fined and imprisoned. He appealed.

H. Thomas, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an indictment against William A. Thompson for the offence of retailing spirituous liquor to a slave. He was tried and convicted in the county of Maury, upon the testimony of one witness, who deposed that he saw the defendant sell a quart of whisky to a slave, and receive from him twelve and one half cents in payment. Defendant moved for a new trial, and based his motion upon three affidavits, viz, those of James H. Thomas, his attorney, Helen Thompson, and James Mulholland.

James H. Thomas swears, that previous to the trial he conversed with the State's witness in relation to the offence charged, and is well satisfied that he was informed by him, that the defendant was not present when the whisky was sold to the negro, but that it was done by a negro in defendant's employment.

Helen Thompson swears, that defendant was at his supper, a distance from the place where the whisky was sold, at least one hour before and one hour after the time the State's witness specified as that at which the whisky was sold by the defendant to the negro.

[Thompson vs. The State.]

James Mulholland swears, that he had on several occasions heard defendant give strict orders to the waiting boy, not to sell spirits to negroes.

Defendant himself swears, that he was taken by surprise, by reason of the swearing of the State's witness that defendant sold the whisky to the negro, and was therefore not prepared to prove his *alibi* by Helen Thompson, nor his ignorance that his servant had sold the whisky to the negro, contrary to his orders.

The Circuit Judge refused to grant a new trial, and a writ of error is prosecuted to this court.

We cannot say that the Circuit Judge erred in refusing a new trial: the whole matter was more fully before him than it can possibly be before us; and he was therefore much better enabled to judge of the propriety of granting a new trial than we can be; and we therefore feel no disposition to interfere with his discretion, especially as it is a case of misdemeanor, and in this respect more nearly approaching trials in civil, than criminal cases, and as such not entitled to so strict a scrutiny by this court as it would be if the offence charged involved life or limb, or might result in confinement in the penitentiary. But, furthermore, the defence of an *alibi* sought to be set up, though very conclusive, if clearly, certainly and fully established, is one so liable to abuse, from the ease with which it is concocted when a design exists to practice a fraud on the State, and even when that design does not exist, by ignorant mistakes as to the particular hour and the lapse of time, that it requires great strictness and attention on the part of the court and jury to avoid being frequently misled by it; and the propriety of granting a new trial, where the offence has been positively proved, with a view of letting in that defence, depends so much upon attending circumstances, which can be under the view of the Circuit Judge only, that it is almost impossible for a court of error to act with safety upon it.

And again, the defendant admits that he expected the State's witness to prove that his negro slave, attending to his liquor booth for him, sold the whisky; and yet he was not prepared to prove that it had been done without his knowledge and against his positive orders.

[Hopson vs. Fountain.]

We have held, that a sale by an agent makes the principal equally guilty as if he had sold it himself; and we cannot see but that the defendant must have been convicted, if the proof had been as he supposed it would be on the part of the State, under all the circumstances of the case.

Judgment affirmed.

NOTE.—For the rules which govern the court in granting new trials in civil cases, see 4 Yerger, 444, 323, 152; 9 Yerger, 330; 3 Yerger, 307; Meigs, 417: *England vs. Burt*, 4 Hum. For the rules which govern in felonies, see 2 Humphreys, *Deines vs. State*; *Kirby vs. State*, 3 Humphreys.

HOPSON vs. FOUNTAIN.

1. Money is a generic term and embraces every description of coin or bank notes recognized by common consent as a representative of value in effecting exchanges of property or payment of debts.
2. Technical words, like others, may have their meaning modified or controlled by accompanying words or phraseology.

This case was tried at the July term of the Circuit Court at Clarksville, in the year 1844, by Judge Martin and a jury. A verdict and judgment were rendered in favor of the plaintiff; from which the defendant appealed.

Boyd, for Hopson, plaintiff in error.

Kimble, for defendant in error.

REESE, J. delivered the opinion of the court.

Fountain sued Hopson in covenant upon the following instrument, to wit:

“\$273 00. Ninety days after date I promise to pay Moses A. Fountain, in current bank money of the State of Mississippi, the sum of two hundred and seventy-three dollars and 73 cents, for services rendered in the year 1838. Witness my hand, the 24th of September, 1839. GEO. B. HOPSON. [Seal.]”

[Hopson vs. Fountain.]

Upon the trial, the defendant proved that when the covenant fell due he resided in the State of Mississippi; and he offered to prove the value of Mississippi bank money, or bank notes, when the covenant by its terms fell due. But the court rejected all evidence on that subject; and charged the jury, "that the criterion of damages on the covenant was the number of dollars specified in it, with interest thereon; that the word *money* had a technical, legal meaning, signifying dollars and cents of constitutional currency, to wit, gold and silver." We cannot consent to the correctness of this definition of the word *money*. It is a generic term, embracing, according to the subject matter of the discourse or writing, every species of coin or currency—guilders, guineas, napoleons, eagles, and bank notes as well as dollars. But if its meaning were, as the Circuit Court holds, when standing alone, *per se*; still, like all other words, its meaning will be modified by accompanying words or phrases. Here the accompanying and qualifying words are, "current *bank* money of the State of Mississippi." *Bank money* means that species of money called *bank notes*; and of that species the parties in this case meant that sort or variety called Mississippi bank notes. They may not be the very best, but at all events they are those about which the parties contracted. The meaning and intention of the parties on the face of the instrument it is not difficult to perceive. Whether, on the grounds of policy, it would originally have been better, in the construction of all such instruments, to have held the word *dollar* to have referred, not to the numerical amount of the bank notes, but to the standard of value, it is now useless to enquire. The principle, in cases where it can apply, has been long and well established. Society conforms to it, in their contracts, and it must be adhered to.

The measure of damages in this case, is the value of current Mississippi bank notes when the covenant was payable. The judgment will be reversed, and a new trial be awarded.

HUTCHISON vs. THE STATE.

1. A single act of open public notorious drunkenness is not indictable.
2. A charge of drunkenness on a specified day and on divers other days and times not specified, is legally a charge of a single act of drunkenness.

The grand jury at the August term of the Circuit Court, held for the county of Hickman, in 1844, presented Hutchison for drunkenness. The indictment charges, that Hutchison, on the 12th day of August, 1844, and on divers other days and times before and since that day, in the county of Hickman, was unlawfully, openly, notoriously and publicly drunk, to the common nuisance of all the good citizens of the State, then and there residing, being, passing and repassing to the great corruption of the public morals, to the evil example, &c. &c.

The case was tried by Judge Dillahunt and a jury of Hickman county, in December 1844.

The State proved that the defendant was drunk in the streets of Centreville, in the county of Hickman, on the day mentioned in the indictment. There was a large crowd present witnessing his drunkenness. It also appeared, that the defendant had often and before that time been drunk in public; that the defendant was noisy whilst getting drunk, and after becoming fully intoxicated, he fell down in the street and went to sleep.

The Judge charged the jury, that however much the acts of the General Assembly *legalising drunkenness*, in any shape, may be regretted by those who have witnessed the happy effects on the public morals, resulting from the enforcement of the common law, yet, as the law now stands, no man can be indicted or presented for a single act of drunkenness, however gross it may be, if no other offence of an indictable grade be committed at the same time. But as to habitual drunkenness the law is the same now that it was before the passage of the late statutes on the subject of drunkenness. If the jury should, therefore, be of the opinion that the defendant had been openly, publicly and notoriously drunk at other times before the day he committed the offence for which he is presented, and in the county of Hickman, that they should find him guilty. But if he had been drunk a single time only, they would find him not guilty.

. [Hutchinson vs. The State.]

The jury returned a verdict of guilty and the Judge (a motion for a new trial and in arrest of judgment having been overruled) fined the defendant five dollars. He appealed.

Nicholson, for the plaintiff in error.

He cited the act passed on the 1st day of February, 1842, and the act passed on the 15th January, 1844, which declare, that no person "shall be subject to presentment or indictment for single acts of intoxication or drunkenness, unless he shall, whilst so intoxicated, commit some other indictable offence;" and contended that they embraced and controlled the present case.

Attorney General, for the State.

Russel declares, that "it is an established principle, that whatever openly outrages decency, and is injurious to public morals is indictable."

Offences which fill this outline come under the general classification of nuisances, but the facts which constitute them are in many cases *sui generis*.

One offence coming under this general head is, running through the streets or highways naked.

Another is exhibiting a dead body for money.

Another is selling a wife at auction. 3 Burrow, 1438.

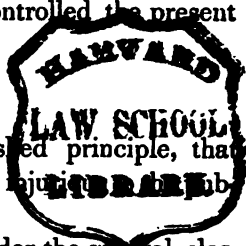
Another is the being a common scold. 12 Serg. & Raw. 220.

Another is making a great noise with a speaking trumpet. 1 Strange, 704.

Another is keeping many dogs, which made great and disturbing noises. 2 Chitty C. L. 646.

Another is exposing an obscene print to the public view. 4 Burrow, 2527. The mere possession of it would not be indictable.

A single act of private fornication is punishable by statute, by a Justice of the Peace, and is not indictable. Yet who would say, that if the act was perpetrated in the streets in the view of the citizens, it would not be indictable on the grounds stated by Russell, to wit, because "it openly outrages decency and is injurious to public morals?" So repeated acts of private



[*Hatchison vs. The State.*]

fornication, amounting to *living in adultery*, constitute a distinct offence and is indictable, (2 Hump. 414,) no matter with what privacy such adulterous intercourse is carried on. This offence is grounded on different considerations from that of public fornication; so the frequenting, privately, bawdy houses, is not indictable, though the offender is liable to be bound over to keep the peace by statute of 4th Edward. Yet if such frequenting be open, public and notorious, it becomes indictable. 2 Ld. Raymond, 1197. 2 Yerg. 483. This offence is a nuisance. 1 Hawkins, ch. 74. See 3 Hum. 203.

Chief Baron McDonald says, "whatever place becomes the habitation of civilized man, there the laws of decency must be enforced." 1 Russell, 271.

Although the legislature may have legalised a single act of private drunkenness, it is contended that repeated acts of open, notorious, public drunkenness constitute a different offence, of a higher grade of criminality, which does not come within the words of the statute. In the case of *Tipton vs. The State*, (2 Yerg. 542,) Judge White states, that an allegation that the defendant was openly and notoriously drunk on a given day, and and on divers other days and times, is in effect an allegation that the defendant was a common drunkard and a nuisance to society. Is not open, public, habitual drunkenness, grossly injurious to public morals and an outrage on decency? All mankind would agree that it is.

It is insisted, that a statute intended to repeal a part of the common law shall be so construed as to repeal it no further than its express words indicate the clear intention of the law makers. 3 Tomlin, 524. Bacon, title, Statute.

By the Court. There is no offence against the laws of Tennessee charged in this case. Let the judgment be arrested and the defendant discharged.

JIM, a slave, vs. THE STATE.

Murder. Circumstantial evidence.*

Jim, a slave, was indicted in the Circuit Court of Dekalb county, for the murder of Isaac, a slave.

He was tried by Judge Caruthers and a jury of Dekalb, at the April term in 1843, and convicted. He appealed, and the judgment was reversed. See 4 Humphreys, 299. He was again tried, at the April term, 1844, by Judge Caruthers and a jury, and condemned to be executed.

He appealed from this judgment.

S. Turney, Bryan and Haynes, for plaintiff in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

It appears, from the bill of exceptions, that Isaac, a slave, the property of William Avant, was murdered in the kitchen of William Williams, in the county of Dekalb, on Saturday night, the 14th of January, 1843. The plaintiff in error, Jim, also a slave, has been indicted and convicted for said murder, in the Circuit Court of Dekalb county, and sentence of death has been pronounced upon him; from which judgment he has appealed to this court.

No question is made as to the regularity of the proceedings, nor was there any exception to the charge of the court to the jury; but the evidence is all set out in the bill of exceptions, and it is insisted that the proof did not authorize the verdict of the jury.

The proof shows, that a negro George, against whose owner exertions were in the hands of the sheriff, and the defendant Jim, against whose owner an attachment had issued, were both

*This case and the succeeding one, to wit, *Bill vs. State*, are deemed worthy of preservation, as illustrating the principles of circumstantial evidence and exhibiting the state of facts on which the supreme court have felt themselves bound to affirm convictions in cases of capital felony.—*Reporter*.

[Jim vs. The State.]

in the same neighborhood, concealing themselves in the woods, and were harbored and concealed by persons living near the place where Isaac was murdered.

The persons having the executions against George, had employed Isaac to catch George, that their executions might be levied. Both George and the defendant Jim had heard, and believed, that Isaac had engaged to betray them, and they both made frequent threats that they would take his life. Both were armed: Jim had a large rifle-barreled pistol, and George had two large smooth-bored horseman's pistols.

Jim and George were well acquainted,—were connected, George's wife being Jim's cousin; and while concealing themselves, to elude the service of process, they were much together, and were both heard, several times when thus together, to threaten the life of Isaac. On one occasion, shortly before the death of Isaac, Sam, a slave, heard the prisoner say he intended to kill Isaac, and enquired whether Isaac would be passing next Saturday night. George was present at this time, and said, "If Isaac was one of the sort that would betray black people, he would be none too good to hurt him." George "agreed" the prisoner, Jim, to kill Isaac. George and the prisoner both had large pistols at this time.

Violet says, she heard Jim say he intended to "lay for the deceased, if he froze, the next Saturday night." This was some time after Christmas. Rose and Violet say, that some time before the murder, and after Christmas, Isaac was at their house, and Jim and George came there together: Jim came in and called Isaac up and talked with him some time, and then told him to go to bed, he was done with him. During this conversation between Jim the prisoner, and Isaac, George remained out of the house at the door. Jim said, when he came in, he was a traveler and had seen the light. Jim staid at their house on the night before the murder was committed. Isaac was killed in their house.

Nancy, a slave, says she was at Cindy's house the night of the murder, and saw Jim there trimming two bullets.

Cindy says, George is her husband and Jim is her cousin. She has heard both George and Jim threaten Isaac. They were

[Jim vs. The State.]

both at her house the night of the murder. They came there about night, and both went out together. Jim returned alone. She heard a gun fire about eight or nine o'clock. The prisoner was in her house at that time. She heard another gun fire about midnight, in the direction of William Williams's. The prisoner was not at her house when the last gun fired. Some time before the last gun was fired, she and the prisoner saw a light in William Williams's field, and prisoner said he thought it must be Isaac, and then remarked, "Oh my Ikey, if you only knew what was depending." After the last gun fired, the prisoner came into her house again, and told her that he had shot the damned rascal, through a crack at William Williams', and that he was lying on the floor before the fire when he shot at him.

Violet, a slave of William Williams, states that Isaac was in her house the night he was killed, sleeping on the floor with his feet towards the fire; that the shooting of the gun waked her, and Isaac asked, "who did that?" she answered, she did not know. Isaac died in about an hour.

William Williams states, that Isaac came to his house about dark on Saturday the 14th January, 1843, the night he was killed; that the witness was waked by the firing a gun or pistol; that he immediately went into his kitchen, where his negroes sleep, and found Isaac on the floor, rolling about in great pain, and that he soon died. There were two bullet holes in his belly.

There is a crack in his kitchen near the door, through which a gun might be fired so as to shoot a person lying on the floor by the fire.

Doctor Freson examined the body of Isaac after his death, and found two bullets in the body, one pewter and the other lead: one was a cut bullet, and smaller than the other. They entered the body about four inches apart: the wound produced by either was sufficient to cause death.

William Williams and William Avant found tracks fifteen or twenty steps from the kitchen where Isaac was killed, the next morning. The night had been cold, and the tracks were only visible at a mud-hole near the kitchen and at the spring

[Jim vs. The State.]

branch. These tracks had been recently made by a person running. At the mud-hole, the water above the tracks had been formed into ice, but the ice was not so thick over the tracks as it was in other parts of the mud-hole. There was a mark on the inside of the right track that showed there was a deficiency in the sole of the shoe that made it: on examining the prisoner's shoes, a piece was wanting in the sole of the inside of the right foot. The tracks were measured, and on applying the measure to the prisoner's shoes, it corresponded with the width, but was about half an inch shorter than the shoe.

David Koger says, he has run and seen the track measured carefully, and found that the tracks would be from one half inch to an inch and a half shorter than the shoe that made them. The tracks would be shortest in soft ground.

Francis L. Boyd arrested the prisoner, on Sunday morning after the death of Isaac, in a cave about half a mile from William Williams's house. The prisoner denied that he had any pistol; he said he had sold his pistol to Peter Creps two or three weeks before for a dollar and a half, and had paid Cellar's Mary fifty cents for washing, and Hart's Daphney thirty-seven and a half cents for a shirt pattern, and still had a "bit." The prisoner said he had never seen Isaac,—was not acquainted with him, but had heard of such a man.

Peter Creps denies that he had bought a pistol from the prisoner; and various witnesses saw him with a pistol within a few days of Isaac's death. All the evidence shows that the prisoner had seen Isaac many times, and knew him well. To one witness, he said he had seen Isaac coming from mill, and could have shot him then, but there was a white boy along; to another, he said he had seen Isaac in Williams's still house; and Violet and Rose prove the interview and conversation with Isaac shortly before the killing.

Both Daphney and Mary deny that they have received any money from the prisoner. Peter Creps shot a fowl about half a mile from William Williams's about 10 or 11 o'clock the night Isaac was killed.

Opposed to all this proof, the prisoner relies upon the testimony of S. Williams's Nancy, who states (in opposition to Cin-

[Jim vs. The State.]

dy's testimony) that the prisoner was in Cindy's house when the last gun was fired; that she was in there with him, was awake, heard the gun fire, and saw Jim in the house. Becky, Nancy's mother, whose house adjoins Cindy's, says she heard Jim talking in Cindy's house the night of the murder: she heard a gun fire shortly after she lay down: she had not been asleep, but was dozing when the gun fired: she heard Jim talking in Cindy's house: he and Nancy and Cindy were talking. The prisoner also proved, that Cindy is the wife of George; that at the trial before the committing magistrates, she spoke only of the firing of one gun, and said Jim was at her house when it fired; leaving the impression on the mind of the witness that Jim continued at her house during the night. It was also proved, that at a former trial in the Circuit Court, Cindy had made the same statement she did before the Justice, and was about leaving the stand when a juror asked her if Jim had a pistol that night: she said he had; and being further asked, she then spoke of another gun having been fired, faltered in her manner, and was sent out. Next morning she was again examined, and stated the facts as she now states them.

The prisoner also proved by Cellars' Mary, that Cindy told her she would have given the world if she had come out before the magistrate and told all she knew, like the other witnesses had. The reason she did not, she did not want to destroy Jim for such a fellow as Isaac was.

The State proved by Sampson Williams, Samuel Williams and Gilbert Williams, sons of Samuel Williams, Sen. the owner of Cindy, Nancy and Becky, that Cindy is a woman of truth, and they would believe her, but that Nancy and Becky are in the habit of telling stories, and are not entitled to full credit.

Upon this evidence, if Cindy is entitled to credit, the prisoner is guilty of the murder of Isaac, upon his own confession. He returned to her house a few minutes after the gun fired, and said he had shot at Isaac through a crack, as he lay before the fire.

But it is earnestly argued, that Cindy is not to be believed; that she has a strong motive to convict Jim, that she may thereby save her own husband, George, who, it is insisted, is the real

[Jim vs. The State.]

culprit; and that she is contradicted by Becky and Nancy, who have no motive to tell a falsehood. It is further insisted, that her manner when testifying at a former trial of this cause, and the discrepancy in her statement before the magistrates and subsequently before the jury, discredit her testimony.

When this case was before this court at a former term, (4 Hump. R. 289,) the decision was placed wholly upon the ground of the misconduct of the jury, and but little attention was given to the proof in the cause. Now, the only question is, whether the prisoner was the perpetrator of the murder.

Although Cindy's testimony is of a character to expose her to criticism, yet, in view of the circumstances, we think she is entitled to credit. In the first place, she does not give at this time an account of the transaction contradictory of her first statement. Then, she withheld important facts which she now relates. She was not interrogated as to the matter, and she doubtless satisfied herself for not telling the whole of the facts, on the ground that she was not asked. This she says was the reason; and every one who has been conversant in courts of justice has witnessed like conduct on the part of witnesses much more intelligent than this slave, and who were entitled to credit. A reluctant witness, anxious to conceal a fact, but not willing to swear to a falsehood, requires often the most direct and searching interrogatories, before the whole truth will be told. In this case on a former trial, Cindy's testimony at first was limited before the jury, as it was before the Justices, until interrogatories were put to her calculated to draw out the facts she subsequently disclosed. The perturbation, confusion and sickness that followed these interrogatories, were a natural result of the predicament in which she was placed, if the facts she felt compelled to disclose were true. She told Mary she did not wish to destroy Jim for such a fellow as Isaac was. She could but know, that her husband, George, and her cousin, the prisoner, had conspired to take the life of Isaac. They had often been at her house together, shortly before the death of Isaac, and she had heard them both threaten to take his life. When, therefore, she was forced to make a disclosure that would so deeply implicate them both, she was appalled at the consequences—con-

[Jim vs. The State.]

sequences she had not contemplated—which came suddenly upon her, and for which her mind was wholly unprepared. In view of these considerations, her sickness and irresolution were natural. No such effects would have been likely to have existed if she were about to invent a falsehood, to screen George, by the conviction of Jim.

In the first place, it is admitted she knew at the trial before the Justices, that those who defended Jim alledged that George was the murderer; and yet her evidence is the same before the jury that it had before been, until she was specifically interrogated. If she had designed to accuse Jim falsely, to save George, she would have prepared her story beforehand, and would have been eager to tell it: her mind would have been prepared for the state of things, and would not have been agitated.

We think, therefore, all the facts in relation to her manner of testifying, rather tend to support and strengthen a belief of the truth of her present testimony, than to invalidate it. But it is said, she told Mary she would have given the world she had come out and told all she knew: the reason she did not, was, she did not wish to destroy Jim for such a fellow as Isaac.

The truth seems to be, that Isaac had not only excited the enmity of George and Jim, but he seems to have lost *caste* with the other negroes in the neighborhood. He had combined with the white folks to betray George to the sheriff, and it was thought he was also engaged to apprehend Jim.—This was no slight offence in their eyes: that one of their own color, subject to a like servitude, should abandon the interests of his *caste*, and, for hire, betray black folks to the white people, rendered him an object of general aversion. Hence it was, that George and Jim felt so little hesitation in the utterance of their threats; and hence it was, that Cindy did not wish to destroy Jim for such a fellow.

Besides, the declaration to Mary, made by Cindy, implies that she had something to disclose; she had not told before the Justices: she wished she had come out and told all. When she does come out and tell additional facts, we are rather to suppose she states that which she wished to Mary she had come

[Jim vs. The State.]

out and told at first, than that it is a statement invented for the occasion.

But it is said Cindy is contradicted by Becky and Nancy. Becky does not contradict Cindy: she was not in Cindy's house, but was in an adjoining one: she heard Jim talk in Cindy's house a little before the gun fired, and then she says she was *dozing*, but not sleeping.

This statement is very vague and inconclusive, and cannot be relied on for anything. Nancy, it is true, does contradict Cindy; but three of their young masters concur in stating they would believe Cindy, but could not give Nancy full credit.

In addition to all this, the whole circumstances of the case support Cindy's evidence.

It is true, that George, as well as Jim, had threatened Isaac: each had the means of committing the murder, and both were in the neighborhood the night the deed was done, and might have perpetrated the act. But in the frequent conversations with the witnesses, when Jim and George made threats, Jim's enmity appears most vehement, and his purpose to kill Isaac is expressed with less equivocation.

Sam says, Jim said he *would* kill Isaac; and George said, if Isaac would betray black folks, he would be none too good to *hurt* him, and he "*aggred*" Jim on to kill Isaac. George equally desired the deed to be done; but, less bold than Jim, he preferred putting him forward in its perpetration, and therefore he stimulated Jim to kill Isaac.

When they went to Violet's house, a short time before the murder, to reconnoitre the ground and become familiar with its localities, and with Isaac's habits when there, we see Jim boldly entering the house, upon a false pretence, while George stands without.

Nancy, the prisoner's own witness, says Jim had a pistol the night of the murder, and she saw him trimming bullets that night in Cindy's house. Her supposition that they were larger than those shown her on the trial is entitled to no weight. But the tracks that were seen, as if made by one running from the kitchen where Isaac was killed, are conclusive to show that Jim was at or very near the kitchen late on the night on which the

[Jim vs. The State.]

murder was done. Those tracks which were in the mud-hole near the kitchen, had ice formed over them, but not so thick as the ice in other parts of the mud-hole. This fact repels the supposition, that they had been made at some previous time. They were unquestionably made the night of the murder, and so late that night that the water over them did not freeze so thick ice as that which had not been disturbed. That these tracks were made by Jim, is so certain, upon a comparison of a peculiar print of one of them, with his shoes, that no effort has been made to evade this conclusion. The conclusion is irresistible, that he either fired the pistol himself, or was present, aiding and abetting George who did it. But no tracks are seen that correspond with the size of George's foot: all the witnesses say, George had a large foot, much larger than Jim's. If he was present at all, he was in such a situation as to escape over ground so hard with the frost as that no tracks were left. When these facts are considered, they conclusively fortify Cindy's testimony, and as conclusively overthrow Nancy's.

Jim was unquestionably absent from Cindy's house at a late hour the night Isaac was killed. Cindy's statement, therefore, of this fact, is true. He ran from the kitchen where the murder was done. This comports with Cindy's statement, that he fired the pistol at Isaac himself. Her testimony is supported by all the facts and circumstances of the case, and is weakened by none of the evidence relied on to attack it. We therefore entertain no doubt of the guilt of the prisoner, and affirm the judgment.

THE STATE vs. BARKSDALE, mayor, &c.

The corporation of a town may be indicted and fined for permitting the streets to remain out of repair, but the officers of the corporation are not individually responsible for such nonfeasance.

The grand jury of Montgomery county, at the November term, 1842, presented the corporation of the town of Clarksville. The presentment charged, that there "was within the corporate limits of the town of Clarksville a public street that was ruinous and out of repair on the 10th day of November, 1842, and for a long time before that day, to wit, for fifty days, it being then and there obstructed by gullies and ravines, so that the same was impassable for horses, carriages or wagons, on that part of said street near the lower Red-river bridge; and that Thomas W. Barksdale is the mayor of the corporation of Clarksville, and W. M. Rodgers, S. McFall, &c. &c. are the aldermen," &c.

This presentment was tried by Judge Martin and a jury of Montgomery county, at the November term in 1843.

The jury found "Thomas W. Barksdale, the mayor," guilty. He was fined ten dollars, and thereupon appealed.

Garland, for the plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

Thomas W. Barksdale, mayor of the town of Clarksville, is individually found guilty upon a charge that a street in the town was permitted to remain out of repair. He is not responsible individually therefor. The corporation is bound to keep the streets in repair; and for neglect in so doing, may be indicted and fined, but no member of the corporation is individually responsible for such neglect.

Let the judgment be reversed and arrested.

NOTE.—Corporations are bound, on common law principles, to keep in good repair the streets within the corporation. Counties are bound to keep in repair bridges and jails; and in all cases where duties of a public nature are imposed on corporations, such corporations are liable to indictment if they fail to discharge those duties according to law. 2 Hawk. 698; 3 Chitty, 588, 566; Petersdorff, vol 10, 326, No. 1, 2, 4, 7.

BILL, a slave, vs. THE STATE.**(CIRCUMSTANTIAL EVIDENCE.)**

Assault with intent to commit a rape.

Bill, a slave, was indicted in the Circuit Court for Lincoln county, for an assault with intent to commit a rape on Mary Smith, a free white woman. He was tried by Judge Marchbanks and a jury of Lincoln county, at the February term, 1844, and convicted and sentenced to be executed.

From this judgment he appealed.

Nicholson & Rodgers, for the plaintiff in error.

Attorney General and Taul, for the State.

TURLEY, J. delivered the opinion of the court.

The prisoner, a negro slave, was indicted and convicted in the Circuit Court for the county of Lincoln, of the offence of an assault, with the intent to commit a rape, upon the body of one Mary Smith, a free white woman; and prosecutes an appeal in the nature of a writ of error to this court.

The fact, that the offence was committed, is very satisfactorily proven, and the only question upon which any doubt arises is, as to the identity of the prisoner, and the person who committed the offence.

Mary Smith proves, that as she was travelling after night, in the road between the town Fayetteville and the residence of her mother, in the county of Lincoln, she met at a branch about half a mile from the town, a negro, whom she at first supposed to be one of her mother's; she asked him who he was, to which he replied, *one*, and gave no other answer. They then parted, the negro proceeding towards the town, and she on her rout to her mother's. After proceeding about one mile and a half further on her road, she found a negro standing in the corner of the fence; a negro boy who was travelling with her, spoke to him, and he answered as if he was alarmed, or had been running; she passed on, and he pursued, overtook her, and af-

[Bill vs. The State.]

ter the use of insolent language pulled her from her horse and threw her upon the ground, informing her what his designs were. The negro boy who was with her came up to her rescue, and beat off the assailant, upon which she fled to a neighboring house for protection, which she found. In the adventure a basket, in which she had some articles of clothing, and among others a pair of pantaloons, an apron for a small boy, nurse, was dropped, and the possession not regained. The facts are all, also, proven by the negro who rescued her from the assault.

The question of difficulty is, whether the person who made the assault was the same she met at the creek, and the prisoner, Bill.

John Watson proves, that on the night the offence was committed, he was on the road travelled by Mary Smith, about one-fourth of a mile from the town of Fayetteville, and about the same distance from the branch where Mary Smith first met the negro; that he saw her pass, and a short time afterwards a negro man rode up and enquired of him, who those were that had passed, to which he replied, he did not know; the negro then observed, that he thought it was Mrs. Husbands and Zack; and said he wanted to see Zack, and immediately turned in pursuit in a gallop or trot. Witness thought the negro was either Bill, the prisoner, or his brother Lewis, and he could not tell which, for they resembled each other much.

Tom, a slave, (the property of James Bright, who lives on the road at a point between the place where Watson proves the negro turned in pursuit and the place where the offence was committed,) proves, that he is acquainted with the prisoner; that his usual place of sleeping is about one hundred yards from his master's house, but, that, the night this offence was committed, he went to sleep at his master's house; how long he slept he does not know; when he wakened he started to his own house; whilst yet in his master's yard he heard the screams of the woman from the direction in which the crime was perpetrated; that he and a fellow-servant, named Charles, went into the house, made a fire, sat down and talked some time about the hollowing they had heard. Bill came to the fence

[Bill vs. The State.]

and called him out; he found him holding his horse; he enquired of him if his brother Lewis had been there that night, to which witness responded no; he then enquired of the prisoner if he had heard the hollowing, to which he answered no. Witness then observed, that it might have been heard to town. Prisoner then observed, that he believed he did hear a little hollowing, but did not pay any attention to it. He stayed about ten or fifteen minutes, and then went away, but in what direction witness does not know.

Alfred, a slave of John Moore, proves, that on the night the offence was committed, Bill left home about one hour after night, and returned in the morning before day. They both slept, usually, in same room.

The facts proven by these witnesses are conclusive, almost to a positive certainty, that Bill was the negro who made the assault; that he was the negro met by Mrs. Smith at the branch, and who turned in pursuit of her, as is proven by Mr. Watson, will not admit of a doubt. Watson believed it was him or his brother Lewis; it could not have been Lewis, there is no proof that he was on the road that night. In a short time after the commencement of the pursuit, and after the offence had been committed, Bill is found at the cabin of the negro Tom, enquiring for Lewis; it must have been Bill of whom Watson speaks.

The identity of Bill and the negro met by Mrs. Smith at the branch, and the negro who turned in her pursuit, being established, there will be but little difficulty in arriving at the conclusion, that it was he also who made the assault. He started in pursuit upon the alledged ground, that he thought it was Mrs. Husbards and Zack, her servant, and that he wanted to see Zack. Now, if this had been true, he certainly would have overtaken them, in the road, as he was well mounted, and started in rapid pursuit. Mrs. Smith on the contrary, was badly mounted and encumbered with a child and luggage, and travelled slowly. It is not possible, that prisoner could have found any difficulty in coming up with her, and he would have done so, mounted on his horse, if there had been any truth in the expressed desire to speak to Zack, as he pretended to be-

[Bill vs. The State.]

lieve the negro to be. The fact, that he did not so overtake them is a powerful, nay conclusive argument against an honest design in the pursuit. But did he meet with them again? We think most assuredly he did. But how is the question? Mrs. Smith, after passing the branch, where she first met the negro, had to travel the two containing sides of a right angled triangle. Bill, in pursuit, dismounted and travelled the side subtending the triangle, and was enabled to throw himself upon the road a little in advance of her, when she met him again the second time. What are the reasons for believing this?

1st. The easy practicability of the thing.

2d. The fact, that if he did not overtake her in this way, he never did at all; a thing totally inconsistent with his expressed design, and the rapidity of his pursuit; there being nothing to have changed his purpose, if it were either lawful or unlawful.

3rd. The fact, that his manner of speaking when met the second time, was that of one alarmed, or who had been violently exercising.

4th. The fact, that when asked, in so short a period after the commission of the offence, that it must have been impossible for him not to have heard the screams of the woman, he first denied it, and then admitted it cautiously and with an effort at carelessness; treating lightly, lamentations of distress which had alarmed a whole neighborhood, and which a witness observed, might have been heard to town, a distance of some two miles.

5th. The improbability, that the idea of committing such an offence, would have so suddenly entered the brain of a person meeting the woman unexpectedly, attended by a servant, and near enough to a dwelling house to have received protection from it, had its inmates been at home.

6th. His presence on the road, within a short distance of the place where the offence was committed, and within a short time after its perpetration.

7th. The fact, that a place is found, where his horse, from appearance, was in all probability hitched, when he commenced the pursuit on foot.

The view of the case is also much strengthened by the fact,

[Bill vs. The State.]

that the cloths of the nurse of Mrs. Smith, which were in the basket lost by her, were afterwards found in the possession of the prisoner, and his account of the manner in which he obtained them is unsatisfactory and contradictory.

But a strenuous and ingenious attempt has been made to weaken the force of these powerful and cogent circumstances, in the first place by proof, that the prisoner was in the town of Fayetteville on the night the offence was committed, as early as 10 o'clock, and that if this be so, it is impossible that he should have perpetrated the offence, at the point of two miles from town, at the time it must have been committed, which it is contended must have been as late as 10 o'clock. To this defence, it is to be observed, that it is impossible to ascertain from the proof, with any thing like precision, at what hour the offence was committed, and it is equally as uncertain, at what hour the prisoner was first seen in town on that night. Mrs. Smith says, that when she passed through Fayetteville, the candles were lit, and the citizens sitting before their doors. Alfred says, the prisoner left home about an hour after night. He lived at a point beyond where the crime was committed, and travelled towards town, while Mrs. Smith was travelling from it. Suppose it to have been later (as it was in all probability) when Mrs. Smith left town, than it was when the prisoner left home, and it could not have been much later, yet they would have been thrown together upon the road, for it cannot be pretended, that he arrived in town before Mrs. Smith passed through it. If Bill travelled the road, he and Mrs. Smith must have met, and the probability, from as near an approximation of time as can be made, is, that they did meet, and at the branch. If that was not Bill, she did not meet him on the road that night, a thing totally inconsistent with the well established fact, that he travelled the road, and that he could not have arrived in town before Mrs. Smith left.

It is also to be observed, that the proof leaves it uncertain, whether Bill arrived in Fayetteville as early as 10 o'clock.

The witness, *Edmond*, a slave of John Bright's, who testifies to the fact, says his master sent him to the well to get water to

[Bill vs. The State.]

bathe a child, he went twice to the well, and saw Bill one of the times, but which he does not recollect.

John M. Bright says, that as he was going to give instructions to his servant, Edmond, to get the water, the clock struck 10; how long after this before the prisoner was seen by Edmond it is impossible to tell. And if a struggle for time is proof of an *alibi*, twenty or thirty minutes become a matter of much importance.

But the whole matter of this defence, is too loosely put together, and of too uncertain and doubtful character to be permitted to outweigh the positive proof, that Bill was not in town, but on the road within time, and at a proper distance, to have been enabled to have committed the offence.

In the 2d place, by a conflict arising out of the dress of the negro met at the creek, and the one where the crime was committed. The negro at the branch had on white pantaloons, and was in his shirt sleeves. The one who committed the offence had on white pantaloons, and a dark colored coat. The proof shows, that the negro met at the branch was riding on something of a dark color, which was taken to be his coat, and which it no doubt was, as he was going to town, he would most probably take his coat with him, although it was now warm weather, as he might well expect to meet his acquaintances, and not choose to do so in his shirt sleeves, and when he dismounted for the pursuit, he might well put on his coat, for two reasons: to avoid its loss, during its absence, and to enable him to appear in a different guise from what he had been seen by Mrs. Smith at the creek, and by Mr. Watson after he had passed her.

Then, upon the whole view of the case, we are constrained to say, that we think, that the proof establishes clearly and satisfactorily that the prisoner, Bill, did meet Mrs. Smith at the branch; that he parted from her on his route, to town; that he soon contemplated the perpetration of the offence which he attempted; that for that purpose he pursued her; that with the view of concealing his identity, and the more easily to overtake her, and effectuate his nefarious design, he dismounted from his horse, and by taking the hypotenuse of the angle

[The Governor vs. Organ's sureties.]

she was travelling round, he came into the road in advance of her; that after being disappointed in his design he returned to the place where he had tied his horse, and after regaining him, he went to the cabin of negro Tom and enquired for his brother Lewis, and hearing nothing of him, he then pursued his way to town, where he remained till he returned home in the morning.

These facts being true, his guilt is established, and we, therefore, affirm the judgment of the Circuit Court.

The questions of law, raised in this case, have nothing in them, and need not be discussed.

THE GOVERNOR vs. ORGAN'S sureties.

1. The plea of covenants performed, admits the due execution and acknowledgment of a Sheriff's bond in accordance with statutory provisions.
2. The principles of the case of *Bryan and others vs. Glass' sureties*, (2 Hump. 390,) recognized and approved.

This is an action of covenant, which was instituted by the Governor against Upton Organ and others, his sureties, on a bond given for the faithful discharge of his duties as Sheriff of Montgomery county.

The defendants pleaded, that they had performed the covenants of their bond, and an issue on this plea was submitted to a jury of Montgomery county, Maney, Judge, presiding, in 1844.

When the Attorney for the State offered the official bond as evidence, it was objected to by the defendants, on the ground, that there was no record evidence that it had been executed and acknowledged by the defendants, and approved by the court, as required by the statute. The court sustained the objection, and a verdict and judgment were rendered for the defendants.

The Attorney General, on behalf of the Governor, appealed.

[The Governor vs. Organ's sureties.]

Attorney General, for the State.

Boyd and Garland, for the defendants.

REKSE, J. delivered the opinion of the court.

This is an action against the defendants, as sureties of Upton Organ, late Sheriff of Montgomery county, upon his official bond.

The defendants pleaded, covenants performed, and other equivalent pleas. This defence admits the due and proper execution of the bond, and imposes upon the defendants the necessity and duty of showing affirmatively the performance by their principal of the liabilities entered into, and arising from the covenant. Yet the court charged the jury, in this state of the pleadings, that the defendants did not appear from the record of the County Court, produced on the trial, to have gone into court and properly acknowledged the bond.

The plaintiff could be turned round by no such objection. The defendants having admitted a valid obligation, and their liability under it, unless discharged by the performance, the due execution of the bond was no way in question.

But even if this had not been so, we are of opinion, that the record of the County Court, which was produced, sufficiently establishes, that the Sheriff's bond was so taken as to constitute it a good statutory bond, both as to the Sheriff, himself, and as to his sureties. That record is as follows:

"Tuesday morning, July 3d. Upton Organ, Sheriff, who had been notified to come into court, by Samuel Edmondson; to give other security, came into court and gave his bond as sheriff and collector of public taxes, with G. Organ, Orville A. Allen, Josiah Morrison, and Andrew Vance, in place of Samuel Edmondson, released."

What is the sense and meaning of this? That the Sheriff came into court, and brought a bond, signed by the persons named? By no means; *he* and *they* came into court and *gave* the bond; of course, when they *gave* the bond to the court, they

[Smith vs. The State.]

executed or acknowledged it; and of course, also, if they gave it to the court, it was approved or accepted by the court.

There is no prescribed formula necessary to be used. In sense, meaning and legal effect, this is a statement, that the Sheriff and his sureties acknowledged the bond before the court.

We are not to strain the construction for the purpose of intending that some mode of execution, not sanctioned by law, was resorted to: but when the words will admit of the construction, we should rather suppose that, what the law requires to be done, was done.

This case, in principle, is very like the case of *Bryan and others vs. Glass' sureties*, 2 Hump. 390, and should be governed by that case.

Let the verdict and judgment be set aside, and a new trial be had.

NOTE.—See 5 Yerger, 599.

SMITH vs. THE STATE.

If a party plays at a game, knowing that others are betting, he is guilty of gaming under statutes passed to prohibit gaming.

Smith was indicted in the Circuit Court of Franklin county.

The indictment charges, that "Smith did bet, wager and gamble, at a game called pitching dollars, he the said Smith then and there betting on said game."

The defendant was tried by Judge Marchbanks and a jury of Franklin county.

It was proved that defendant and one Anderson pitched dollars; that a dollar was bet on each game; but witness could not state whether it was the defendant or defendant's father that bet the dollar on the game; that one or the other did. The bet was made in the presence of the defendant, if not by him.

The judge charged the jury, that if they should regard the

[Smith vs. The State.]

evidence as establishing the fact, that defendant and Dickerson pitched dollars, and the father of defendant bet a dollar on the game with Dickerson, and the defendant knowing they had bet, such pitching would be gambling under the statutes.

The jury returned a verdict of guilty. The defendant moved the court for a new trial. The motion was overruled, and the defendant fined. He appealed.

H. L. Turney, for the plaintiff in error.

Attorney General, for the State.

The second section of the act of 1799, (N. & C. 356,) provides, that any one shall be fined who shall play at, or encourage or promote any game of hazard or address. The act of 1803, renders such persons indictable. All persons aiding, assisting or encouraging gaming, though they do not bet, are guilty of gaming as principals. 3 Yerg. 134: 5 Yerg. 144.

The statutes against gaming are to be construed as remedial, and not as penal statutes. Act of 1824, ch. 5. See *Bagby vs. State*, 1 Hump. 490, where this statute is acted on. This statute was intended to cure defects in indictments, and authorize the court to extend the statute to cases within the spirit of the acts, and within the mischief intended to be remedied.

GREEN, J. delivered the opinion of the court.

The only question in the case is, whether a party who engages in a game of hazard or address, upon which he knows others are betting, is indictable and punishable for gaming, although he may not bet any thing himself.

The act of 1799, ch. 8, sec. 2, (N. & C. 356,) provides, that if any person encourages or promotes any game of hazard or address for money or other valuable thing, he shall forfeit and pay the sum of five dollars. The act of 1803, ch. 12, sec. 2, provides, that any person who shall play within the meaning of the act of 1799, ch. 8, shall be liable to indictment or presentment.

The court has repeatedly held, that by virtue of these acts

[The Governor vs. Porter et al.]

a person encouraging or assisting the playing at cards, or other game for money, is indictable although he does not bet. 3 Yerg. Rep. 134: 5 Yerg. Rep. 144.

If a party plays at a game upon which he knows others are betting, he becomes thereby a guilty participator in the gaming although he may not bet himself.

The illustration of counsel opposed to this view of the case, that upon the principle here stated, a candidate for office is guilty if he knows that others bet on his election, does not apply.

Betting on elections is not embraced in the general laws against gaming, but is prohibited by a special statute.

We think there was no error in the charge of his Honor to the jury, and affirm the judgment.

THE GOVERNOR vs. PORTER and sureties.

1. A Sheriff's bond for the collection and payment of State taxes is valid, whether taken for one or two years.
2. A mandate of the legislature to the judiciary, directing what construction shall be placed on existing statutes, is an assumption of judicial power, and unconstitutional.

This action of debt was instituted by the Governor, in the Circuit Court of Maury county, on a sheriff's bond.

The declaration described a bond given for the collection and payment of State taxes for two years, to wit, 1840 and 1841. To this declaration there was a demurrer, and it was argued before Judge Dillahunt, at the January term, in the year 1844. The demurrer was sustained, and the Attorney General, Baxter, on behalf of the State, appealed.

Attorney General, for the State.

No person appeared for the defendants.

[The Governor vs. Porter et al.]

JOHN J. WHITE, Special Judge, delivered the opinion of the court.

This is an action of debt in the name of the Governor of the the State of Tennessee, for the use of the State, against the Sheriff of Maury and his securities. It is founded upon their bond, which is dated 4th of May, 1840, and made payable to James K. Polk, Governor of the State of Tennessee, and his successors in office, for the use of the State, conditioned for the collection and payment of the State taxes for the years 1840 and 1841.

There are several counts in the declaration, and breaches assigned for the default and delinquency of the Sheriff, in his office, for the year 1841.

To this declaration there is a demurrer, which was sustained by the Circuit Judge, and judgment given for the defendants, from which there is an appeal in error to this court.

The only question which arises here, is in regard to the validity of the bond which was given by the Sheriff and his securities. This bond embraces both years of his official term, and it is contended, that the County Court had no authority to take such a bond, and that the same is therefore void. In *Mabry vs. Tarver*, 1 Hump. 94, it was decided by this court, that under the act of 1835, ch. 15, sections 1 and 2, (N. & C. 621,) a bond given by the Sheriff for the collection and payment of the taxes for two years, his entire term, was a good bond. And this is evidently the true construction of that act, for it says, the Sheriff "shall give bond," &c., not two bonds, nor bonds for each successive year, but he is to give bond conditioned for the collection and payment of the taxes by him collected, or which ought to have been collected, on or before the first Monday of October, in each and every year in which he shall collect the taxes, which could be as well included in one bond as two. There is nothing in the language or policy of that act, which would make such a bond void, although an annual bond given by the Sheriff would likewise be good, as held by this court in *Nevil and securities vs. Day*, 3 Hump. 37.

Under the act then of 1835, this is a good bond, and it only

[The Governor vs. Porter et alis.]

remains to enquire whether at the time when this bond was given, the act of 1835 had been repealed by that of 1839-40, which brings us to the consideration of that act. By the first section it is enacted, "that the first and second sections of said act, (referring to the act of 1835,) which require bonds to be executed by Sheriffs and their securities, for the proper collection and payment of the State and County revenue, shall be construed to require said bonds to be given hereafter every year." Pamphlet Acts of 1839-40, p. 235.

With regard to this section of the act, with the highest respect for the legislature, as a co-ordinate branch of the government, we are constrained to say, that we regard it as clearly an unconstitutional enactment, and whenever that is the case, it becomes the solemn duty of the Judiciary, so to declare it, as the Constitution is the paramount law.

The argument upon this point may be stated in few words. Under the Constitution, the powers of the government are divided into three distinct departments, the Legislative, Executive and Judicial. And each department is prohibited from exercising any of the powers properly belonging to either of the others. See Art. 2, sections 1, 2, N. & C. 50. It is upon this division of power, that the security of the citizen, as well as the limitations upon power contained in the Constitution, mainly depend for their preservation. To the Legislature belongs the power of enacting such laws, within the limits of the Constitution, as the policy of society and its varying interests may seem to require. But after their enactment, it is then the province of the Judiciary, to ascertain their meaning, and determine upon their construction. Any other doctrine would destroy the *checks* contained in the Constitution against the abuse of power, and tend to a concentration of all power in a single department of the government. It is unnecessary to dwell upon this point farther than merely to say, the legislature of 1835 enact a law in reference to the collection of the revenue. That of 1839-40, without repealing that law or enacting a different one so far as the first section of the act is concerned, which we are now considering, which it was perfectly competent for them to do, undertakes to say what is the meaning of the former

[The Governor vs. Porter et al.].

law, and to decide upon its construction. This we think was beyond their power.

We come now to the second section of the act of 1839. By this section, it is made "the duty of the County Court Clerk, on the first Monday in April, in each year, to call on the collectors to renew their bonds." Neither this, nor the preceding section, purports in terms to repeal the act of 1835, nor is there such a repugnance to that act as makes it a repeal by implication. The language here used, is merely directory, imposing a certain duty upon the Clerk, and which would no doubt make it the duty of the collector to renew his bond when called on. But there is no penalty imposed upon the Clerk for not performing this duty, or upon the collector for not complying with the requisition. Under this law, as well as under the former, there is no doubt an annual bond given by the Sheriff would be good. But still it by no means follows, that a bond given for two years by the Sheriff, as required by the first act, would not likewise be valid. We have no means of judging of the meaning of the legislature, except by the language they have used. And they nowhere declare in this act, that a bond given for two years shall be void; and if such had been their intention, it is to be supposed they would have so expressed it, and made ample provision for the protection of the public revenue, and to secure the due execution of an annual bond.

Collectors are required by this section, to *renew* their bonds, which supposes they may have been once given for the whole term, but that the public interest requires their renewal. This statute, as well as that of 1835, concerns the public good, and it is considered a correct principle with regard to such statutes, that they should receive a liberal construction, and such an one as will render them effectual. And this court should certainly hesitate, without the most urgent necessity, to place such a construction upon the act of 1839, as would endanger the security of the public revenue, and permit it to be plundered by a delinquent public officer without any security, which might be the result of a different construction of this act.

The view of it here taken, imposes no hardship upon the

[The Governor vs. Porter et als.]

obligors in the bond, because they are presumed to enter into it, with a full knowledge of the extent of their obligation.

These acts, as we think, may well stand together. Under the act of 1835, the Sheriff has given bond for the whole term. Under that of 1839, he is required to renew it for the second year, which if he does, it is to be presumed the public interest will be advanced by it; if he fails to renew it, the public are still protected by the security which has already been given upon the old bond.

With regard to the other objection, that the bond in this case is conditioned for the collection and payment of the taxes, without stating that it is to be to the Treasurer, this court held in the case of *Miller et al. vs. Moore*, 2 Hump. 423, that under the second section of the act of 1835, where the words "to the Trustee of the county" were omitted, that would not vitiate the bond, which is decisive upon this point.

The judgment of the Circuit Court must be reversed, the demurrer overruled, and the cause remanded for further proceedings.

NOTE.—Judicial acts of a legislature. See 2 Peters' Rep. 413: 3 Greenleaf, 334: 1 N. H. 199: 3 Dallas, 386: 2 Cranch, 272: 4 Pick. 23: *Jones vs. Perry*, 10 Yerg.: 2 Pet. 660. 15 Mass. 328: 4 Monroe, 91: 3 Greenleaf, 326: 4 Greenleaf, 140: 4 Yerg. 202.

GREEN et als. vs. ALLEN et als.

1. A devise "to the Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said Conference and the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom," is held inoperative and void, and cannot be sustained by a Court of Chancery in Tennessee, because such devise exhibits only a general indefinite purpose of Charity, both as to persons and objects.
2. An act of the Assembly appointing trustees to receive a donation on behalf of an unincorporated association after the death of the donor, is unconstitutional, void, and vested the trustees with no rights.

William Wright made a will in which were the following clauses:

"I desire that my mill, with the appurtenances thereto, and all and any species of property found in my possession at my death, not otherwise disposed of, shall be sold.

"I desire that one-fourth part of the money arising from the sale of the property disposed of, as above mentioned, shall be given to the Tennessee Annual Conference of the Methodist Episcopal Church for the benefit of institutions of learning under the superintendence and control of said Conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may decide best in their discretion."

Wright died in Montgomery county, Tennessee, and the will was admitted to probate in August 1840.

The legislature in 1841, by act, appointed A. L. P. Green, John F. Hughes, George W. Dye, John B. McFerrin and John G. Henning "trustees to receive the donation" of said Wright.

N. A. Allen, the executor, refused to pay over the proceeds of the sale as directed by the will. This bill was thereupon filed by the Trustees on behalf of and by order of the Tennessee Conference, and by Robert K. Roberts, President of the Missionary Society of the Methodist Episcopal Church on behalf of said Society, in the Chancery Court at Clarksville against Allen the executor, and against the widow and heirs of said Wright. The bill prayed that the validity of said bequest might be declared and established, and that said executor

[Green et al. vs. Allen et al.]

might be decreed to account for the one-fourth part of the proceeds of the sale of the property as directed by the will.

The bill contained no allegation that the Tennessee Conference of the Methodist Episcopal Church or the Missionary Society of said Church was incorporated.

The defendants demurred to the bill.

The case was argued before Chancellor McCampbell, at the November term, of the Chancery Court at Clarksville, in the year 1843. He sustained the demurrer and dismissed the bill.

The complainants appealed.

Meigs, for complainants.

1. The 4th clause of this will makes a conversion "out and out" of the real estate embraced in it, (1 Williams' on ex'rs. 417, 418,) and charges the executor with a trust to sell and pay.

But it is objected, that he cannot pay to the Conference or to the Missionary Society, because they are merely voluntary associations; and because the objects of the trust are too indefinite; and because the discretion of these Associations as to the management of the fund is arbitrary and unconstitutional. 10 Ves. 539.

To this it is answered:

1. That this charity would be sustained under the statute of 43 Elizabeth, and the construction placed on it in England and America.

And to prove that this statute is in force, we rely on the North Carolina act of 1715, ch. 31, sec. 7, (1 Scott, 22,) from which it appears that all the English statutes made "for the indulgence to Protestant dissenters" are re-enacted. Those statutes were the "Toleration Act" passed in 1689, and the "Occasional Conformity Act," passed in 1712. See Neal's History of the Puritans, 576 to 585. The reason of enacting these laws will be found in 3 Neal, from 185 to 192, and in 1 Hallam's Constitutional History. From these books it will be seen under what grievous burdens the Non-Conformists labored in England; that the earliest settlements in North Carolina were chiefly by dissenters; and that, to their influence that pro-

[Green et al. vs. Allen et al.]

vision in the law of 1715 is owing, is plainly shown by Bancroft, vol. 2, 131 to 137.

Charities for dissenters were not administered in the English Chancery Court till the Toleration Act, 1689. But as soon as that act was passed, the act of 43 Elizabeth, 1601, came to be regarded as applicable as well to charities for them as for the establishment. Shelford on Mortmain, 87 to 90, top pages.

Now, as the effect of the Toleration Act was, to open the doors of the Chancery Court, previously closed against the Dissenters, and to cause that court to enforce charities for them, just as for the establishment, it is contended, that, the re-enactment of that act in North Carolina as well as all other statutes for indulgence to dissenters, carried with it all the consequences which had followed its enactment in England. And it is insisted, that this charity is one which at this day, would not admit of argument in the English Chancery Court, administering charities under the statute of Elizabeth, and this without any aid from the *cy pres* doctrine, which we admit is an abusive exercise of jurisdiction.

2. To the objections, we answer in the second place, that the Court of Chancery, by its common law powers, exercised immemorially, can execute this trust, as will be shown by these authorities, which apply as well to this point as to the first. 7 Vesey, 30: 6 Paige, 639: 24 Pick., 146: 4 Metcalf, 378: 3 Edwards, 79: 9 Cowen, 484: 1 Hawkes, 132, 133: 1 Hoffman, 264: 3 Peters, 104, opinion 112: 3 Paige, 297: 17 Serg. & R. 88: 16 Pick. 107: 4 Dana's R. 354: 20 Wendell, 115 to 119.

From all these authorities we insist that it is now an established principle of American law, that the Court of Chancery will sustain and protect such a gift as this. 6 Paige 649-50.

3. As to the manner in which the court will divide this fund between the Conference and Missionary Society. See 10 Ves. 538: 3 Merival, 18: 7 Vesey, 59, note, *Doyley vs. Doyley*: 10 Ves. 28, 29: 6 Paige, 652, 653.

Boyd, for the defendants.

It is a well settled rule of the common law, that a communi-

[Green et als. vs. Allen et als.]

ty not incorporated cannot take by purchase or succession. *Baptist Association vs. Hart's ex'rs.*, 4 Wheat. 1: *Holland vs. Peck*, 2 Iredell's Eq. 257: 3 Peter's R. 99: 10 Coke, 26: Com. Digest, title, Capacity B. 1: 8 John. 385, 422: 9 John. 783: 2 Wendell, 109: 3 Peters, 99.

The bequest in question, therefore, if given to the two societies or to the members thereof, for their own use, and not coupled with a trust, are clearly void. It is not pretended that there is any trust declared in the bequest to the Missionary Society, and that bequest must fail for want of a legatee to take it. We insist that the bequest to both Societies is void for uncertainty in the devisee, and the property not being otherwise disposed of in the will, vested in the next of kin, and no subsequent appointment of trustees for said Societies or act of incorporation granted by the legislature can divest them of their interest. 4 Wheat. 1: 3 Peters, 99. When the will in this case was admitted to probate, and the defendant Allen qualified as executor, the rights of the parties were fixed by law, and they could not be divested out of the defendants, except by the judgment of their Peers or the law of the land. The appointment of trustees to carry into effect the provisions of the will in question, is a judicial act, and ought to have been executed by the courts, and not the legislature. The act appointing A. L. P. Green and others trustees, is unconstitutional and void. 2 Yerg. 554, 599: 4 Yerg. 202: 5 Yerg. 320: 6 Yerg. 119: *Jones vs. Perry*, 10 Yerg.

These decisions were made by this court previous to the adoption of the present constitution, and if any doubt could have been originally entertained about their correctness, none can exist now about the constitutionality of the act in question. The 7th section of the 11th Article of the Constitution denies to the legislature the power to suspend any general law for the benefit of particular individuals, or to pass any law for the benefit of individuals inconsistent with the general law. 3 Hump. 483.

The bequest to the Missionary Society not being coupled with a trust, is clearly void. But it is insisted that the bequest to the Tennessee Annual Conference of the Methodist Episco-

[Green et al. vs. Allen et al.]

pal Church for the benefit of the institutions of learning under the superintendence and control of said Society, is a bequest upon trust, and that a Court of Equity will take jurisdiction of the trust, and will not permit it to be defeated on account of the incapacity of the trustees to take the property, but they will appoint trustees to carry into effect the provisions of the trust according to the intention of the testator. We do not controvert the correctness of the general principle as here stated, but we deny its application to the case before the court. To assume that the bequest in question is a valid trust, is begging the question in dispute between us. We deny that there is any valid trust declared in the will in favor of the complainants, which a Court of Equity can carry into execution. It makes no difference how clearly a trust may be declared in a party, yet if the terms by which it is created are so vague and indefinite that Courts of Equity cannot clearly ascertain its objects or the parties who are to take as beneficiaries, or the manner in which the trust is to be carried into execution, the trust fails and the property falls into the general estate of the donor. 2 Story's Eq. sect. 979, 1156, 1157, 1183, 1197: 1 Dev. Eq. 276: 2 Keen's R. 255: 1 Turn. & Russ. 260, 270, 271: 1 Russ. & Mylne, 232: 11 Cond. Eng. Ch. R. 150: 5 Harris & Johnson, 393.

Here the bequest is to the Tennessee Annual Conference, for the benefit of institutions of learning under their superintendence, and to the Missionary Society of the Methodist Episcopal Church, and to such other purposes as the said Conference, in their wisdom, may deem best. Who are the beneficiaries to take this bequest? The bill does not allege that the Conference has any institutions of learning under its superintendence and control. How shall the money be applied? Shall it be used in the purchase of books, maps, philosophical or astronomical apparatus? Shall it be applied to building of school houses, academies, or endowing professorships in colleges of law, medicine or divinity? Shall it be applied to the benefit of male or female schools, or shall it be applied to such other purposes as the said Conference may deem best in their wisdom? Who shall exercise the discretion which the testator intended

[*Hopson vs. Fountain.*]

to confer upon the Conference? If this court interferences, they will assume to exercise a discretion not given to them by the testator, a discretion which he intended to limit to the Conference, but which they cannot exercise, and in doing so they may execute their own will, instead of that of the testator. 2 Iredel's Eq. 257: 4 Dana, *Moore vs. Moore*: 4 Wheat. 1: 3 Peters, 99: 5 Harris & John. 393: 11 Cond. Eng. Ch. R. 150.

The complainants insist, that even if the bequest in the will be liable to the objection of uncertainty by the rules of the common law, that yet this court will interfere and sustain it as a valid donation to charitable uses under the statute of 43 Elizabeth. Judge Story says, "that the jurisdiction of the Court of Chancery over charities where no trust is interposed, or where there is no person in *esse* capable of taking, or where the charity is of an indefinite nature, is not to be referred to a general jurisdiction of that court, but sprang up after the statute of Elizabeth, and rests mainly on its provisions." This rule he gives rather as the result of the cases than as his own opinion. 2 Story's Eq. sec. 1162: Cooper's Eq. 102, 103: 4 Wheat. 1: 3 Peters, 99, 481. The statute of Elizabeth was passed to remedy evils in existence at the time of its passage, and it does not in its terms purport to make any donations to charitable purposes good, which were not good before its passage, and I am at a loss to see upon what ground it can be said that that statute made these gifts and bequests good which were void for uncertainty by the common law. The plain language of the act itself shows that it was never intended to be in force and use in the Colony of North Carolina. That Colony had not the officers who were required by the act to carry its provisions into effect, and the plain meaning of the words of the act merely never can be made to justify the extravagant construction given to it by the courts of England, and which has been followed by some of the courts in this country. See the Act in Viner's Abr. 476. Courts of Equity, independent of the statute and upon the doctrines of the common law, have jurisdiction over bequests and devises to charitable uses as they have over all other valid trusts, and they will enforce them provided the objects be sufficiently definite, so as to shut out all

[Green et al. vs. Allen et al.]

arbitrary discretion resting on *cy pres* doctrine. 4 Kent, 508. This doctrine, *cy pres*, is unreasonable and unjust. There is nothing in the statute of Elizabeth, from which it can be fairly deduced, and it is not in force in this country. *Wilson vs. McCauley*, 1 Dev. Eq. 276: *Haywood vs. Cravans' ex'rs.*, 2 Car. Law Rep. 257: 2 Iredel's Eq. 257: *Gallys vs. The Attorney General*, 3 Leigh, 450: *Moore vs. Moore*, 4 Dana: 11 Cond. Eng. Ch. R. 150: 5 Harris & John. 393. Even if the statute of Elizabeth is in force in this country (and I don't believe it is, the decisions in N. Carolina and other States to the contrary notwithstanding) we are not bound to adopt the extravagant and unreasonable construction which has been given to it by the English courts, or to give our sanction to the absurd doctrines, said to have their foundation in its provisions. But we should construe that statute by the same rules that we construe our own, confining ourselves to its plain meaning, as we have done upon our Statute of Frauds and Statute of Limitation. *Patton vs. McClure*, Martin & Yerg.: 3 Yerg. 305, 496: 7 Yerg. 288: 8 Yerg.

No bequests to charitable uses have been sustained in England since the statute of Elizabeth, except such bequests as are enumerated as such, or which have been deemed by analogy within its spirit, and the courts in this country have rejected the construction upon that statute given by the English courts.

A bequest to trustees to such charitable or public purposes, or to such persons as the trustees in their discretion should think fit, was held void, because the trustees could dispose of fund in any manner they pleased. 2 Story, sec. 1157: 1 Sym. & Stew. 69. So a bequest to such benevolent and charitable purposes as the trustees in their discretion should think most beneficial, held void, because it did not limit the gift to cases of charities only, but extended it to cases of benevolence. So a bequest to executors of a fund, to apply it to and for such charitable and other purposes as they shall think fit, without being accountable to any person whatever for their disposition thereof, held void. 1 Myln. & Craig, 236, 298, 299: 2 Story's Eq. sec. 1157. These bequests if given to charities in the most general terms, would have been held good if they had been

[*Green et al. vs. Allen et al.*]

confined to charities alone. Now, independent of the statute of Elizabeth, objects of benevolence would deserve the favor of the courts as fully and as amply as those objects recognized as charities by that statute.

Bequests to charities may also fail, for the uncertainty in the amount to be given to charities. 2 Roper on Legacies, 179 and cases there cited. This bequest is still more uncertain, because it does not fix the amount to be given to the Tennessee Conference for institutions of learning, or what amount is given to the Missionary Society, or what amount they shall apply as they deem best in their discretion, and does not declare what portion shall be applied to institutions of learning in this State, and what in the State of Alabama.

Fogg, for defendants.

J. Bell, for complainants.

TURLEY, J. delivered the opinion of the court.

Wm. Wright departed this life in the county of Montgomery, in the year 1840, having previously made and published his last will and testament, by which he directed his executor, N. H. Allen, to sell his mill with the appurtenances, and all and every species of property found in his possession at his death, and not otherwise disposed of; and gives one-fourth part of the proceeds arising therefrom to the Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said Conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom. This will was duly proven by the executor, at the August term, 1840, of the County Court of Montgomery, who thereupon proceeds to execute the trust reposed in him.

On the 22d day of December, 1841, the Legislature of the State of Tennessee passed a private act, by which A. L. P. Green, John F. Hughes, George W. Dye, John B. McFerrin and James G. Henning were appointed trustees to receive the

[Green et als. vs. Allen et als.]

donation thus made to the Tennessee Annual Conference of the Methodist Episcopal Church, and now file this bill, by the direction of said Conference and Robert R. Roberts, President of the Missionary Society of the Methodist Episcopal Church, and Senior Bishop thereof, against the executor and the heirs at law of Wm. Wright, the devisor, to have the donations bequeathed to the Tennessee Annual Conference paid to them, to be appropriated to the purposes specified in the will. To this bill the defendants file a general demurrer, which was allowed by the Chancellor, and thereupon an appeal is prosecuted to this court.

The question presented for consideration upon the demurrer is, whether the bequest is such one as can, by established principles of law, be sustained as a charitable use, the execution of which can be decreed and enforced by a Court of Chancery in the State of Tennessee.

This is the first time that questions arising out of donations for pious and charitable purposes, have been presented for the consideration of our courts. We are consequently left without the aid of previous adjudication upon the subject, except so far as to be found in the decisions of the courts of England, and in some of our sister States. We are also left without the aid of legislative enactment, and thrown altogether upon the common law, English statutes, and English exposition of them, as the sources from which our information is to be derived. The necessary consequence is, that in the attempt to adapt to our social relations, a system which has been matured by usage, by statutes, by judicial construction, in a country so different from ours in the origin and form of its government, the habits and customs of its people, the form of its religion, and its tenures of property, we are involved in much difficulty and perplexity. This difficulty is much increased by a confusion in the authorities, arising out of the conflict of power in relation thereto, as exercised by the Chancellor, on the one hand, as the representative of the King, who, as *parens patriæ* exercises an absolute control of a large class of charities, and on the other as a judicial officer, administering justice by virtue of his office, in the execution and administration of uses and trusts.

[Green et al. vs. Allen et al.]

The difficulty consists in ascertaining how much of the power of the Chancellor of England, upon this subject, has been devolved upon the Courts of Chancery in this State, and to what extent it is limited by the form and nature of our institutions. The difficulty has been felt in its full force, and I regret, that circumstances have prevented, on my part, as full and complete an investigation of the subject as it well deserves from its novelty and intrinsic merits. The discussion necessarily involves two propositions.

1st. What is the common and statutory law of England in relation to the question in controversy.

2d. What portions of the law, as thus fixed in England, are in force and obligatory in the State of Tennessee.

The first proposition opens a wide field of investigation, commencing with the origin of donations for pious and charitable purposes, and ending with the principles upon which they are at present recognized and protected by the Court of Chancery in England: an investigation alarming from its extent and perplexity, but necessary, absolutely necessary for the proper understanding of the questions in controversy. I do not propose to conduct it minutely, and have no hope that I shall do it with perfect accuracy; all I design or expect, is so to review the subject as to be able to approximate with a sufficient degree of certainty, to the true sources of power, out of which the jurisdiction of the Chancellor in England arises in relation to trusts of this character, and be enabled to deduce therefrom the true rule of action upon them in the State of Tennessee. Mr. Story in the 2d volume of his Treatise upon Equity Jurisprudence, sec. 1137, observes, "that it is highly probable, that the rudiments of the law of charities were derived from the civil laws." If by this is meant, that the first evidences of the existence of an unsuccessful attempt to confine donations for pious and charitable purposes within proper bounds, and to restrain the civil and religious abuses arising out of them, is to be found in that code of jurisprudence, I see no reason to question the correctness of the observation. But if we are to understand by it, that the source of the English jurisprudence, upon the subject, is to be sought and found in the civil law, I trust I may be per-

[Green et al. vs. Allen et al.]

mitted to doubt the correctness of the remark. The evils arising from an indiscriminate and reckless conveyance of property, both real and personal, to superstitious uses, were no doubt first experienced in the decline of the Roman Empire.

It is a cause of melancholy reflection to those who have looked into the history of the Church, to find at how early a period its hierarchy, forgetting the great and vital principle which had been so impressively taught them, "that the Kingdom of Christ was not of this world," entered into a struggle in the first place for the attainment of wealth, and in the second place for the acquirement of temporal power. The new but zealous converts, imperfectly acquainted with the mild and self-denying tenets of the religion they professed, having but a very imperfect conception of the principles of action upon which they hoped for the enjoyment of that immortality of happiness promised them; ignorant of the propriety and necessity of controlling and suppressing their evil and wicked propensities, were early led into the belief, that a composition for their indulgence was to be found in dedicating to the Church their worldly wealth, which from the high estimate placed upon it by themselves, they judged, might be highly prized as an atonement for their crimes. Accordingly as Mr. Story observes, one of the earliest fruits of the Emperor Constantine's real or pretended zeal for christianity, was a permission to his subjects, to bequeath their property to the Church. Code. Theodos. Lib. 16, tit., 2, 1, 4. But this permission was soon abused to so great an extent as to induce the Emperor Valentinian to enact a mortmain law, by which it was restrained. This restraint was, however, gradually relaxed, and in the time of Justinian, it became a fixed maxim of Roman jurisprudence, that legacies to pious uses were entitled to peculiar favor, and to be deemed privileged testaments. The influence of the clergy, and the blind credulity of their followers, having been enabled to abrogate the wise policy of Valentinian, established upon the empire a system destructive alike to the prosperity of the country, and to the purity and piety of the Church.

Like causes produced like effects in the barbarian kingdoms erected upon the destruction of the Western Empire, and it is

[Green et al. vs. Allen et al.]

to these causes, rather than to the Roman law upon the subject, that we are to look for the origin and establishment of charitable and pious donations, as I apprehend. Not a government in Europe but what was subject to the intolerable evils resulting from the system. Wealth was first sought by the clergy, for their own ease and comfort, and then for its power. In connexion with the great influence exercised by them over a rude, ignorant and semi-civilized people, it enabled them for centuries to dictate in temporal as well as spiritual affairs; to struggle and struggle successfully with the spear, as well as the mitre. In no country in Europe, was the evil felt more strongly than in England. For as observed in Shelford's Treatise upon Mortmain, the great and increasing accumulation of property in the hands of the monasteries and religious houses, soon after the conquest, and the consequent extension of Papal and Ecclesiastical power, in this kingdom, appear, by our historians, to have been considered in the light of national grievances. 1st. Rapin, 278: Fuller's Hist. of the Church, book 3, 77: Prynne's Hist. Edw. 1, 237. History informs us, that this influence, wielded by a Beckett, was able to shake Henry the 2d, one of England's greatest monarchs, upon his throne, and that in the reign of his son, John, it came near transferring her as a province to France, and did for the time being, subject her to pontifical sway. But our ancestors were a stern people, and had great regard for feudal rights; they saw where the evil rested, and at an early period commenced hedging it in.

The first legislative enactment upon the subject, is to be found as early as 9th Henry 3d, ch. 36, re-enacted 25th Edward 1st, ch. 36, which provides, that "it shall not be lawful, from henceforth, to any, to give his lands to any religious house, and to take the same lands again, to hold of the same house. Nor shall it be lawful for any house of religion to take the lands of any, and to leave the same to him of whom he received it. If any, from henceforth, give his land to any religious house, and thereupon be convicted, the gift shall be utterly void, and the land shall accrue to the lord of the fee." But the religious houses and the clergy, who, Lord Coke quaintly observes, 'were to be commended, for always having of their counsel the most

[Green et al. vs. Allen et al.]

learned men of the laws, found many ways of evading this statute, by purchasing lands holden of themselves, by taking leases for long terms of years, and by other devices.' Shelford on Mortmain, 6. And it was found necessary, to prevent such evasions, to enact the statute 7th Edward 1st, 2, called the statute *de viris religionis*, by which after reciting, "that of late it had been provided, that religious men should not enter into the fees of any, without the licence and will of the chief lord, of whom such fees were holden immediately; and notwithstanding such religious men had entered, as well into their own fees as into the fees of other men, appropriating and buying them, and some times receiving them of the gift of others, whereby the services which were due of such fees, and which at the beginning were provided for the defence of the realm, were wrongfully withdrawn, and the chief lords did lose their escheats of the same, it is provided, that no person, religious or other, whatsoever he be, that will buy or sell any lands or tenements, or under any color of gift or lease, or that will receive, by reason of any other title whatever it be, lands or tenements, or by any other craft or design will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements may come into mortmain. We have provided also, that if any person, religious or other, do presume either by craft or design to offend against this statute, it shall be lawful for us, or other chief lords of the fee, immediately to enter into the land so aliened, within a year from the time of the alienation, and to hold it in fee as an inheritance," &c.

In order to evade this statute of 7th Edward 1st, the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them. The tenant by collusion made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law upon a supposed superior title. And although proceedings of this kind were carried on, by a species of conventional fraud, between the religious houses and tenant of the land, yet the judges held, that in these cases the religious communities did not appropriate such lands *per titulum domi vel alterius alienationis*, as the statute *de religionis*

[Green et al., vs. Allen et al.]

7th Edward 1, expressed it, and that they were not within the words, *aut alio quovis modo arte vel ingenio*, for as the recoveries were prosecuted in a course of law, they were presumed to be just, and thus originated common recoveries.

To meet this device of the ecclesiastics, the statute of 13th Edw. 1st, chap. 32, was passed, by which it was enacted that "when religious men and other ecclesiastical persons did implead any, and the party impleaded made default, whereby he ought to lose his land, forasmuch as the Justices thought hitherto, that if the party impleaded made default by collusion, that where the demandant by occasion of the statute could not obtain seisin of the land, by title of gift, or other alienation, he should now by reason of the default, and so the statute was defrauded; it was enacted, that in this case after default made, it shall be enquired by the country, whether the demandant had right in the thing demanded or not: if it was found he had right, judgment should pass for him, and he should recover seisin; and if he had no right the land should accrue to the next lord of the fee, if he demanded it within a year of the time of the inquest taken, &c.

The next expedient resorted to by the ecclesiastics, to elude the statute of mortmain, was the adoption from the Roman law, of the distinction between the possession of land, and the use or beneficial interest, by obtaining grants, not directly to, but to the use of, their religious houses, and their successors, by which they took the profits. The *Clerical Chancellors*, who presided at that time, assumed a power of compelling the feoffees to perform the trust which had been reposed in them; by which means the same inconvenience was soon felt by the King and Lords as would have followed from direct alienation in mortmain. Shelford on Mortmain, 16; 2 Inst. 75; 1 Saunders on Uses, 16, 17; 4 ed.

To remedy this abuse, it was enacted by the statute of 15th Richard 2d, ch. 5, "that within a limited time all those who were possessed by feoffment, or by any other means, of lands and tenements, fees, advowsons, or possession of any other kind whatever, to the use of religious people or other spiritual persons, should either regularly convey them in mortmain by the

[Green et al. vs. Allen et al.]

license of the King and other lords, or that they should, within the time limited, sell them to some other use, under the penalty of their being forfeited to the King and lords respectively, according to the statute *de religiosis*. And under the same penalty it was enacted, that from thenceforth no such purchase should be made, so that religious or other spiritual persons should enjoy the profits.

Up to this time, as Mr. Shelford observes, all the statutes of mortmain, made, relate only to ecclesiastical corporations: civil corporations began now to attract the public attention, and the same inconvenience to be felt from the appropriation of land or tenements by them as by the former. It was therefore enacted by the statute of 15th Richard 2d, ch. 5, "that the same statute should extend and be observed of all lands, tenements, fees, advowsons, and other possessions, purchased or to be purchased, to the use of guilds or fraternities;" and moreover it was assented, "because mayors, bailiffs, and commons of cities, boroughs and other towns, which have a perpetual commonalty, and others, which have offices perpetual, as people of religion; that from henceforth they shall not purchase them, and to their commons or office, upon pain contained in the statute *de religiosis*; and whereas others be possessed or shall hereafter purchase to their use, and they thereof take the profits, it shall be done in like manner, as is aforesaid of people of religion."

Another device practised by ecclesiastics, was to get their villains to marry free women, who had inheritances, so that the lands might come to their hands, by the right which the lord had over the property of his villain. The commons, in the 17th year of Richard 2d, petitioned for remedy against this evil, but were answered that sufficient remedy was provided by the statute. Shelford, 182.

Only a spiritual body politic or corporate, having perpetual succession, was capable of an appropriation: the effect of which was to create a perpetual incumbent with all the temporal rights of the benefice and cure of souls; and therefore, originally, appropriations were made to abbots, priors, deans, prebendaries, and such others as could perform divine service. But in progress of time, appropriations were made to orders consisting

[Green et aln. vs. Allen et aln.]

of a number of persons, as deans and chapters and nuns, who could not minister the sacraments, or perform divine service; and a vicar was appointed to perform divine service, to whom a portion of the revenue was allotted, and they to whom the appropriation was made retained the principal part of the revenues, without performing any service for it. An appropriation could not be made without the consent of the King, the Patron, and the Ordinary. The Pope was formerly considered supreme ordinary, and made appropriations without the bishop, who was only considered an inferior ordinary. To remedy this inconvenience, it was provided by the next chapter of the same statute, that in every license, for the future to be made in chancery for the appropriation of any parish church, it should be expressly provided, that the diocesan of the place should appoint, according to the value of the church, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same church by those to whom the appropriation was made, and their successors, to the poor parishioners of each church, and that the vicar should be well and sufficiently endowed. Shelford, 18; Plowden, 496 and 97.

It being found that some gifts of lands, not within the statute of mortmain, had very much increased, it was thought expedient to restrain such alienations as equally prejudicial to the community with those in mortmain: accordingly the statute of 23d Henry 8th, ch. 10, the first act against superstitious uses, was enacted; by which it was provided, "that all assurances and trusts of lands, to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies or brotherhoods, erected and made for devotion, or by common assent of the people without any corporation, or to uses to have obits perpetual, or a continual service of a priest forever, or for sixty or eighty years, should be held to be within the mischiefs of alienations in mortmain, and to be utterly void as to such gifts as were made after the first of March in that year, for any term exceeding twenty years from the creation of such uses, and all collateral acts and assurances for evading that act are declared to be utterly void. It appears from this statute, that

[Green et al. vs. Allen et al.]

aggregate bodies did and could take in perpetual succession, without being corporated.

In this attitude were the contending parties found at the time of the rupture between Henry the 8th and the Church. The cause of that quarrel and the consequences resulting from it, are too well known to need particular specification: let it suffice, that the property which had got into the religious houses and monasteries was appropriated by him to his own uses. The first statute on this subject was passed in the 27th Henry 8th, ch. 28, by which all monasteries, priories, and other religious houses of the monks, canons and nuns, which had not lands, tenements, rents, tithes, portions, and other hereditaments, above the clear yearly value of £200, together with all the possessions of such religious houses, were given to the King, his heirs and assigns, forever. The monasteries described by this act are usually called the smaller abbeys. By the second, passed 21st Henry 8th, ch. 13, "all monasteries, priories, nunneries, colleges, hospitals, houses of friars and other religious and ecclesiastical houses and places, and all their manors, lands, tenements, tithes and other hereditaments, which since the 4th day of February, in the 27th Henry 8th, had been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the King, and all other monasteries, &c. and places, which should afterwards happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the King, and all their manors, lands, tenements, &c. and other hereditaments were vested in the actual seisin and possession of the King, his heirs, successors, &c. forever."

The Priory or Hospital of St. John of Jerusalem in England and another house belonging to the same order in Ireland were dissolved by the statute of 32d Henry 8th, which was passed expressly for that purpose. The statute of 37th Henry 8th, ch. 4, charged misdemeanors on the priests and governors of chantries; that of their own authority, without the assent of their donors, patrons or founders, they had let leases for life, or terms of years, of their lands, and some had suffered recoveries, levied fees, and made feoffments or other conveyances, contrary

[Green et al. vs. Allen et al.]

to the will and purpose of their founders, to the great contempt of the royal authority; wherefore, in consideration of his Majesty's great cost and charges, in his then wars with France and Scotland, the Parliament put him and his successors forever, in the real and actual possession of such chantries. The reformation in England having become completely ascendant, the remaining establishments of this kind were destroyed by statute of 1st Edward 6th, ch. 14, which gave the King "all chantries, colleges and free chapels, all lands given for the finding of a priest forever, or for the maintenance of any anniversary, obit, light or lamp, in any church or chapel or the like, all fraternities, brotherhoods and guilds, (except those for mysteries and crafts,) with all their lands and possessions."

Thus ended this desperate struggle between the temporal powers and the church, which commenced, as we have seen, as early as the reign of Henry 3d, and was ended in the reign of Edward 6th, by a complete and triumphant prostration of a domineering and grasping hierarchy, and the establishment of a system in relation to the conveyance of lands, tenements and hereditaments in perpetuity, which is absolutely necessary to the wellbeing of society, which is still in existence in England, and which was imported by our ancestors into the province of North Carolina, and from thence into the State of Tennessee.

These statutes have not, however, been held applicable to conveyances for charitable uses and trusts, though in most respects liable to the same abuses as conveyances in mortmain, and productive of the like political and civil evils. The only apparent and rational reason why these statutes were not made to embrace such conveyances, would seem to be, that during the dominance of the church of Rome, and pending its struggle with the Kings and Parliament of England, for the right to hold lands in mortmain, conveyances for charitable purposes, as such, were very rare; because the church assumed to be the proper channel through which charities were to be distributed, and were ever ready and able to procure to itself all such conveyances. The history of the law upon this subject prior to the statute of 43 Elizabeth, ch. 4, which is emphatically called the statute of charitable uses, is extremely obscure. We have

[Green et als. vs. Allen et als.]

seen that it has been considered as probable, that its rudiments were derived from the Roman or civil law. But, as has been observed, we see no reason for ascending to that source for its origin, when the same causes which produced the action of the emperors of eastern or Greek empires upon the subject, were in operation in full force and rigor in England. No one can doubt, that the system of charitable uses is cousin-german to that of mortmain, arising out of the same human propensities, and stimulated and encouraged by the same orders in society. In all probability, the commencement of its origin was at some period of time during the struggle between the priesthood and the lay authorities in England, in relation to lands held in mortmain, and may have been another device on the part of the clergy, to evade the statutes upon that subject. If this be so, it perhaps would have been commenced about the time of the passage of the statute of 15th Richard 2d; made to avoid conveyances in trust for the use of religious people, and it might have arisen as a substitute, and the instances not sufficiently numerous to attract public attention until 23d Henry 6th, the first statute against superstitious uses, which, as we have seen, places all assurances and trusts of land to the use of parish churches, chapels, church wardens, guilds, commonalties, companies, fraternities, or brotherhoods, erected or made for devotion, or by common consent of the people, without any corporation; or to uses to have obits perpetual, or a continual service of a priest forever, or for 60 or 80 years, were declared to be within the mischief of mortmain, and to be utterly void. Here commenced the distinction between conveyances in trust, for the use of such purposes as were charitable, and such as were superstitious, which, as we shall have occasion to see, has been ever since maintained in England, by judicial determination, and which will be productive of a strange anomaly, if attempted to be carried out in this State. But be this as it may, it is certain that few traces remain of the exercise of the jurisdiction of a court of chancery upon the subject in any shape, prior to the statute of Elizabeth. As it is probable, however,—nay almost certain,—from the wording of the statute, that the practice of executing such conveyances, originated at a period an-

[Green et al. vs. Allen et al.]

tedent to its passage, it is also probable that they were sustained by the court of chancery in some form or other before that time, most likely by bill to enforce the performance of the trust; as we have seen that the clerical chancellors of that period had assumed a power of compelling feoffees to uses to perform the trust which had been reposed in them. But whether this be so or not, is, in our opinion, immaterial to the question in controversy in the present case: for if such relief were granted, it must have been against a trustee, and in favor of a distinct positive trust; and if this were not so, and they assumed a jurisdiction at large, upon the subject, without regard to a fixed principle of action, subject alone to the whims and caprice of the Chancellor, it would furnish no obligatory rule of action for us. Indeed, the searching into the chancery office of England at a time anterior to the reign of Elizabeth, for principles of chancery jurisdiction, as applicable to our system of government and jurisprudence, would be like looking for a live body in an Egyptian catacomb. Mr. Story, in his treatise upon Equity Jurisprudence, §1143, says: The principal, if not the only cases now to be found previous to the statute of Elizabeth, were decided in the courts of common law, and turned upon the question, whether the uses were void or not within the statute against superstitious uses. One of the earliest cases is *Porter's* case, 1 Coke, 22, which was a devise of lands, devisable by custom to the testator's wife in fee, upon condition that she should assure the lands devised for the maintenance and continuance of a free school, and certain almsmen and almswomen; and it appeared, that the heir had entered for condition broken and conveyed the same lands to the Queen. It was held, that use being for charity, was a good and lawful use, and not void by the statutes, against superstitious uses. Lord Eldon, in commenting upon this case, in the *Attorney General vs. Bowyer*, 3 Vesey, 726, observes: It does not appear that a court of chancery at that period had cognizance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now writing, (viz, an information to establish a charity,) but they

[Green et al. vs. Allen et al.]

made out their cases, as well as they could, by law. So that the result of Lord Eldon's researches on this point is, (as Mr. Story observes,) "that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities. And it is remarkable, that Sir Thomas Egerton and Lord Coke, who argued Porter's case for the Queen, though they recited many antecedent cases, refer to none which were not decided at law."

Mr. Story further observes in this connexion: "The absence, therefore, of all authority derived from equity decisions, on an occasion where they would probably have been used, if any existed, certainly does very much favor the conclusion of Lord Eldon. If we might hazard a conjecture, it would be, that Porter's case, having established, that charitable uses, not superstitious, were good at law, the court of chancery, in analogy to cases of other trusts, immediately held the feoffees to such uses, accountable in equity for the due execution of them; and that the inconvenience felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise within a very few years to the statute of 43d Elizabeth, ch. 4."

But be this as it may, (and in our opinion, as before observed, it is a question of little or no importance in the consideration of this case,) it is certain that, under the statute of Elizabeth, the jurisdiction of the Chancellor was greatly enlarged, either by the operation of the statute, or what is more probable, by an assumption of power hitherto unknown in that court, and based upon that statute, by construction, whether well or ill founded, as Mr. Story observes, is now of no consequence. For, as he again observes, "bills to establish charitable uses might have been introduced by Lord Ellesmere about five years before the statute of Elizabeth, which were sustained against feoffees for charitable uses, but not where the donation was to charity generally and no trust estate was interposed, and no legal estate devised, to support the uses; as it is very certain, that at law devises to charitable uses generally, without interposing a trustee, and devises to non-existing corporations, or to an unincorporated society, would have been, and in fact were, held utter-

[Green et al. vs. Allen et al.]

ly void, for want of a person having a sufficient capacity to take as devisee."

The statute of Elizabeth cured this defect, and provided a new mode of enforcing such uses, by a commission under the direction of a court of chancery. This brings us to the examination of that statute, and the discussion of the principles introduced by, and the practice under it. This statute, after reciting "that lands, rents, annuities, hereditaments, goods, chattels and stocks of money, had been given and appointed, for various charitable uses, therein enumerated, viz, relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and marines, schools of learning, free schools and scholars in universities, for repair of bridges, ports, havens, causeways, churches, sea banks and highways, for education and preferment of orphans, for or towards relief, stock, or maintenance, for houses of correction, for the marriage of poor maids, for supportation and help of young tradesmen, handicraftsmen, and persons decayed, for relief or redemption of prisoners or captives, and for aid and ease of any poor inhabitants concerning payments of fifteenths, setting out soldiers and other taxes; which had not been employed according to the charitable intent of the giver and founder thereof, by reason of frauds, breaches of trust, and negligence in those who should pay, deliver and employ the same;" enabled the Lord Chancellor or Keeper of the Great Seal of England, for the time being, "to award commissions into all or any of the parts of the realm respectively, to the bishop of every civil diocese, and his chancellor and other persons, authorizing them, or any four or more of them, to enquire, by a jury of the country and by other means, of all gifts, limitations, assignments and appointments aforesaid; and of the abuses, breaches of trust, negligences, misemployments, not employing, concealing, misconceiving or misgovernment, of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money, theretofore or thereafter to be given, limited, appointed or assigned, for any of the charitable and goodly uses before rehearsed; and after the commissioners, or any four of them, upon calling the parties interested, should make enquiry, by the

[Green et al. vs. Allen et al.]

oaths of twelve or more men of the county, who might be challenged by the parties interested, and upon such enquiry set down such orders, judgments and decrees, in order that the charitable gifts might duly and faithfully be employed for the charitable purposes for which they were given by the donor thereof: which orders, judgments and decrees, not being contrary to the orders, statutes or decrees of the donors or founders, should stand firm and good, according to the tenor thereof, and be executed accordingly; until the same should be undone or altered by the Lord Chancellor, or Lord Keeper of the Great Seal, upon the complaint of any party aggrieved, to be made to him." Now the first thing that strikes us on reading this statute, is, that upon its face it is wholly remedial, not intended to enlarge the jurisdiction of the court, upon the subject matter; not intended to introduce any new rule of action thereon, in relation to the rights to be acquired under donations or devises for charitable uses, but only to authorize and require the chancellor to adopt a new remedy for the preservation and enforcement of such donations, by a commission, under the provisions of the statute. It is not, then, surprising, that shortly after the passage of the statute it became a matter of doubt, whether the court of chancery could grant relief by original bill, in cases within the statute, or whether the remedy was not confined to proceedings by commission. This doubt remained till the case of *Attorney General vs. Newman*, 1 Chancery Cases, 157, in the reign of Charles the 2d, when it was settled in favor of the jurisdiction of the court by original bill. The consequence of this decision, and the practice under it, has caused the power given by the statute, (to wit, the appointment of a commission,) to fall into disuse, and the chancellor assuming to do by original bill what was designed by the statute to be done by commission, a course of practice novel and complicated in its character, has been introduced into the chancery court, difficult of comprehension by American lawyers, and one almost impossible to shape to American use. In the examination of the nature and extent of this jurisdiction of the chancellor as established by construction under the statute of Elizabeth, the first thing necessary to consider is, what gifts come under the

[Green et al. vs. Allen et al.]

denomination of charitable uses, in contradistinction to superstitious uses which are not within the statute. As to what are considered charitable gifts, it is sufficient for the present purposes to say, that the statute has received an equitable construction, and many things which may be classed *ejusdem generis*, besides those specified in the statute, have been held to be charities, within its meaning and purview; but it becomes for us much more important to enquire, what things are considered to be superstitious uses, and not within the protection of the statute. And we find that a superstitious use is defined to be, where any manors, lands, tenements, rents, annuities, profits, hereditaments, goods or chattels, are given, received or appointed, for and towards the maintenance of a priest to say mass; for the maintenance of a priest or other man, to pray for the soul of any dead man, in such a church or elsewhere, or to maintain perpetual obits, lamps, torches, &c. to be used at certain times, to save the souls of men out of purgatory; or to maintain an anniversary or obit, or any light or lamp, in any church or chapel, or any like. Gifts for the following purposes are decided to be superstitious: For the good of the soul or for praying for the soul of the testator, or for the dead, whether in or out of a chapel or church, or for the maintenance of popish priests; for finding priest or obit, even for eight years; for hiring a priest to say mass for the souls of the feoffor or his friends. So to find, support and maintain forevermore, a taper of wax of a pound weight, to stand and burn before the image of our Lady, in the chancel of a parish church, at all divine service to be done and said within the same church, in the honor of our God and Lady and all saints,—is a superstitious use.

In the case of *Doe dem. Willard vs. Hawthorn*, 2 Barnwell & Alderson, 96, Lord Tenterden seems to have been of opinion, that a trust for supporting a chapel, for a congregation of protestants assembling under the patronage of Lady Huntingdon's college, was a superstitious use within the statute of Henry 8th, ch. 10. So is a legacy for such purposes as the superior of a convent or his successor, should judge most expedient. So is a bequest of legacies to Roman Catholic establishments

[Green et al. vs. Allen et al.]

in foreign countries, and the kingdom of Great Britain, and many others too tedious to mention, of a like character, but which may be seen upon inspection of the 3rd section of Shelford's Treatise on Mortmain, page 89.

There is also a class of cases, in which uses and trusts are neither charitable nor superstitious. A general direction by a testator to apply property for benevolent purposes, or to such objects of benevolence and liberality, as the executor in his own discretion shall most approve of, or in private charity, or for charitable and public uses in general and undefined terms, without naming any specific object, have been held not to create charitable uses. Thus where the testatrix bequeathed all her personal estate to the Bishop of Durham, his executors, &c. upon trust, to pay her debts and legacies, and to dispose of the ultimate residue to such objects of benevolence and liberality, as the Bishop of Durham in his own discretion shall most approve of,—it was said the residue could not be held to be given to charitable purposes; and as the trust was too indefinite to authorize an application to any other purpose, it followed that the residue remained undisposed of, and to be distributed among the next of kin to the testatrix. 9 Vesey, 399.

So when a testator, after the decease of his wife, gave lands to trustees and their heirs upon trust to pay certain legacies, with a power to sell or mortgage, and proceeded thus: "The surplus or reversion of said messuage, &c. and premises, after my said debts and legacies are so discharged, to be applied to the said trustees and the officiating ministers of the congregation or assembly of the people called Methodists, that now usually or that shall for the time being assemble at Longford in Foleshill, as they shall from time to time think fit to apply the same. To which purpose I will and devise, that when any two or more of my said trustees shall die, the survivors or survivor shall, from time to time, nominate or appoint others." Lord Elenborough, C. J. said, that it was nothing like a devise to charitable uses, for the trustees might apply the estate to any use they thought fit, the will not aiming to confine them to apply it to charitable uses, although it might be supposed that the

[*Green et al. vs. Allen et al.*]

testator meant them to apply it to fanatical and superstitious uses. Yet it was left to their caprice. 6 East, 328.

So a bequest to three persons and their executors and administrators, "in trust, to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on," was held not to amount to a charitable use. *James vs. Allen*, 3 Mer. 17.

In order to create a charitable use, the general principle is, that the trust must be of such a tangible nature, that the court can deal with it: when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of chancery. *Shelford on Mortmain*, 85.

A devise of money to be given in private charity, was held not to be sufficiently definite to give the crown jurisdiction, or to enable the court to execute the trust. *Ommanney vs. Butcher*, Tur. & Russ. 260.

A great many other cases of like character may be found in the 2nd section of *Shelford on Mortmain*, 83. These are sufficient for the purposes for which they were designed. The charitable use under the statute, being in existence, and the power of the chancellor in England to protect and enforce it being granted, the next subject of enquiry is, how this power is exercised. His jurisdiction upon the subject seems to be derived from three sources: 1st, As a representative of the crown: 2nd, Under the statute of Elizabeth, which is personal, and not exercised in virtue of his ordinary or extraordinary jurisdiction: and 3rd, As a judge exercising inherent power in the execution and administration of uses and trusts, under the extraordinary jurisdiction of the court. These three branches of jurisdiction embrace every case of charitable donation, cognizable before the chancellor.

Mr. Maddox, in his treatise upon the principles and practice of the High Court of Chancery in England, says, in book 1st, page 1: All matters determinable in the Court of Chancery, may be classed under the one or the other of the following heads: 1st, The common law jurisdiction; 2nd, The equity jurisdiction; 3rd, The statutory jurisdiction, and 4th, The specially delegated jurisdiction. The first and second are fre-

[Green et al. vs. Allen et al.]

quently called the ordinary and the extraordinary jurisdiction. The first, the common law, or ordinary jurisdiction, invested the chancellor with various powers, which are not required to be minutely investigated, in the case under consideration, as the administration of uses for charitable purposes, does not arise under it, in any of the phases in which it is presented: let it suffice, that under it he is a privy counsellor, and prolocutor of the House of Lords, as well as the patron of the King's livings, under the value of twenty marks per annum: that he is also a conservator of the peace, and may award precepts and take recognizances for the peace; that Parliament is summoned by writs issued by him, and that all acts of Parliament are enrolled and kept in his office: such other parts of his common law jurisdiction, as have been made the subject of consideration in the Court of Chancery, are principally of three kinds: 1st, The nomination, &c. of officers of the court; 2d, Proceedings in the Petty Bag office; 3rd, The ordering of writs to be made out by the cursitors. The extraordinary jurisdiction of the Court of Chancery distinct from the courts of law, is, as Mr. Cooper, in his work upon Equity, page 23, says, certainly a peculiarity in the jurisprudence of the country—though the distinction between law and equity has heretofore been familiar with all nations, both ancient and modern,—“The precise time, however, when this separation took place, and the means by which it was effectuated, are points of some difficulty, at this distance of time, to ascertain.” “No mention is made in Granville, Bracton, or in any of our judicial classics, of a court of equity; which furnishes the most decisive evidence of its non-existence, when the treatises were compiled.” The first register book, or book of minutes, or orders, made in the Court of Chancery, is of Easter term, 36th Henry 8th: in none of our books of cases is any to be found there determined till the 37th Henry 6th, except only on the subject of uses; and our great antiquarian Lambert, who was a master in chancery, and keeper of the records in the Tower, found no proceeding whatever, before the 20th of Henry the 4th, when on account of the troubles of the times, feoffments to uses, began. But, nevertheless, it is beyond a doubt, that the court exercised its equi-

[*Green et al. vs. Allen et al.*]

table jurisdiction in the reign of Richard the 2nd; and it has been the generally received opinion, that the equitable jurisdiction began even so early as the reign of Edward the 3rd. If the origin of this jurisdiction is to be traced to uses and trusts, this is most probable. We have seen that one of the expedients of the ecclesiastics, to elude the statutes of mortmain, was the adoption from the Roman law, of the distinction between the possession of land and the use or beneficial interest, by obtaining grants, not directly to, but to the use of, their religious houses, and their successors, by which they took the profits; and that the clerical chancellors, who presided at the time, assumed the power of compelling the feoffees to perform the trust; and that to remedy this evil the statute of the 15th Richard 2nd was passed. Now, it is very probable, that this practice of the ecclesiastics had been in use several years before it was found necessary to provide against it; and this may well have thrown the decisions of the chancellor, upon the subject, back into the reign of Edward 3rd, the immediate predecessor of Richard 2nd; and it is also highly probable, that the use of conveyances in trust, which became very common between laymen during the struggles which commenced between Henry 4th and Richard 2nd, and ended with the death of Richard 3rd, may have been adopted, from the practice of the ecclesiastics, previous to the passage of the act of 15th Richard 2nd; and that the decisions which had commenced upon ecclesiastical trusts were continued and increased upon lay trusts, until they produced the passage of the statute of 27th Henry the 8th, which struck at the evil, by transferring the possession to the use. But, as has been before observed, it is a matter of very little importance, when this jurisdiction commenced: the principles upon which it was exercised were well fixed; the proceeding was against a feoffee or trustee to uses, and these uses must have been such as were not against the law; and therefore Mr. Story, as we have seen, observes, "that it is very certain that at law devises to charitable uses generally, without interposing a trustee, and devises to a non-existing corporation, or to an unincorporated society, were held utterly void, for the want of a person having sufficient capacity to take as a devisee:

[Green et al. vs. Allen et al.]

and also that bills for the enforcing donations, where the charity was general, were not sustained, where there was no trust estate devised to support the uses.

I therefore think that we may safely assume, that the power of the chancellor to decree an execution of a trust for charitable purposes so far as it arises out of his extraordinary jurisdiction, rests upon the same principles as trusts of every other kind and description, and that there must be either a *cestui que trust*, having sufficient legal capacity to take as devisee, or donee, or that there must be a feoffee or trustee, charged with a specific and legal trust, before the jurisdiction can be exercised. The jurisdiction of the chancellor as exercised upon this subject, by the construction of the statute of Elizabeth, and by delegation, is essentially different from that exercised by him under the extraordinary jurisdiction of the court, and is either by virtue of the sign manual of the King, or information by original bill, to which the Attorney General, as representative of the King, is necessarily a party. It becomes necessary to investigate the nature of the King's power upon this subject, with the view of ascertaining the extent to which it goes, and when it may be exercised by virtue of his sign manual, and when by information by the Attorney General.

Mr. Shelford, in his Treatise upon Mortmain, 268, says: "The protection of several interests is vested in the crown as *Parens Patriæ*, as in the case of charities, infants and lunatics. It is said, that the King, as *Parens Patriæ*, has a superintending power over all charities, abstracted from and antecedent to the statute of 43rd Elizabeth, ch. 4, which paternal care and protection is delegated to the court of chancery; and therefore, when persons, who are named as trustees to charities, fail in the performance of their duties, either by death or disability, or refusal to act, the constitution has provided a trustee in the person of the King."

Sir William Blackstone, in the third volume of his Commentaries, 427, observes, that the King, as *Parens Patriæ*, has the general superintendence of all charities, which he now exercises by the keeper of his conscience; and therefore, whenever it is necessary, the Attorney General, at the relation of some

[Green et al. vs. Allen et al.]

informant, who is usually called the relator, files, *ex officio*, an information in the Court of Chancery, to have the charity properly established. This proposition, however, is too general, as has been observed. For, though it be true, that where a charity is established, and there is no charter to regulate it, (as there must be some power to regulate,) the King has in that case a general jurisdiction; yet if there be a charter, with proper powers, the charity must be regulated in a manner prescribed by the charter, and there is no ground for the controlling influence of the Court of Chancery. 1 Vesey, Sen. 328; 2 Fonb. Eq. 208, n.

Mr. Shelford again observes, same work, page 269: "The principal, originally the whole, jurisdiction, of a court of equity, was the administration of trusts, by protecting not only the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From that principle arose the practice of administering the trusts of a public charity. Persons possessed of funds appropriated to such purposes, are within the general rule: but no one being entitled by an immediate and peculiar interest, to prefer a complaint for compelling the performance of the obligations of trustees, and to enforce their responsibility, it is the duty of the Crown, as *Parens Patriæ*, to protect property devoted to charitable uses, and that duty is executed by the officer who represents the Crown for all forensic purposes; and on that foundation rests the right of the Attorney General in such cases to obtain by information the interposition of a court of equity.

In the case of *Wellbeloved vs. Jones*, 1 Sim. & Stew. 40, it was held that the Attorney General is a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution as part of its general funds; and that when a legacy is given for permanent charitable purposes to persons having no corporate character, the court will not, without a reference to the Master, allow the fund to be paid over to those persons, even when they are intrusted by the testator with the management of the fund. The Vice Chancellor said, "The Attorney General must be made a party, because the King, as *Parens Patriæ*, superintends the adminis-

[Green et al. vs. Allen et al.,]

tration of all charities, and acts by the Attorney General, who is his proper officer in this respect. It has not been held necessary that the Attorney General should be a party, where a legacy has been given to a treasurer or other officer of some established institution: and this exception is reasonable; for the Attorney General can have no interference with the distribution of its general funds. The court will never permit this legacy to come into the hands of the plaintiffs, who now happen to fill the particular offices in this society; but will take care to secure the objects of the testator by the creation of a proper and permanent trust; and upon the hearing, will send the cause to the Master for that purpose, and it will be one of the duties of the Attorney General to attend the Master on that subject."

Lord Redesdale, in the case of *The Corporation of Ludlow vs. Greenhouse*, 1 Bligh. N. S. 48, said, "That the ground stated in all the books is this, that the King is to be considered as the *Parens Patrie*; that he is the protector of every part of his subjects; and that therefore it is the duty of his officer, the Attorney General, to see that justice is done to every part of those subjects. It would be highly improper for the Attorney General, assisting in that character, to press harder upon one party than on another. It is his duty to see that justice is done, and it was for that purpose that informations in the name of the Attorney General were presented, for the purpose of carrying into execution charitable dispositions, or for providing for the due distribution of charitable funds. Relators were required, because the Crown paid no cost. The Attorney General, prosecuting as the officer of the Crown, could not be liable for costs, and a complaint might be made highly oppressive, unless there were some persons responsible for the cost that might be incurred in consequence of the proceeding."

It was established by three early cases, viz, *Attorney General vs. Siderfin*, 1 Vernon, 224, *Attorney General vs. Matthews*, 2 Lev. 167, *Clifford vs. Francis*, Freem. 320, "that when property was not vested in trustees, and the gift was to a charity generally, not to be ascertained by the act of the individuals referred to, the charity was to be disposed of, or a bill to be preferred in the Attorney General's name, not by a scheme

[Green et al. vs. Allen et al.]

before the Master, but by the King, the disposer of such charities, in his character of *Parens Patriæ*." In the case of *Mogridge vs. Thackwell*, 7 Vesey, 83, Lord Eldon observed, "It is established, that where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as *Parens Patriæ*, is the constitutional trustee:" and the result of an elaborate investigation of all the authorities, by that learned judge, in that case, was, that "the general principle most reconcilable to the cases, is, that where there is a general, indefinite purpose of charity, not fixing itself upon any object, the disposition is in the King by sign manual; but that where the execution is to be by trustees, with general or some objects pointed out, the court will take the administration of the trust." And in a subsequent case, *Pierce vs. Archbishop of Canterbury*, 14 Vesey, 372, his Lordship observed, "that the distinction which he observed in the case last cited, was, that where the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the Master; but where the object is charity, without a trust interposed, it must be by sign manual." That is, in the one case the relief is by original bill, upon the information of the Attorney General, and in the other upon the sign manual of the King.

Mr. Story, in his work upon Equity Jurisprudence, §1190, says: "The general doctrine in England is, that the King, as *Parens Patriæ*, has a right to guard and enforce all charities of a public nature, by virtue of his general superintending power over the public interest, where no person is intrusted with that right.

Whenever, therefore, money is given to charity, generally and indefinitely, without any trustees pointed out, who are to administer it, there does not seem to be any difficulty in considering it a personal trust devolved upon the King as the constitutional trustee, to be administered by him, through the only proper functionary known to that government, viz, the Lord Chancellor, who is emphatically, for all public purposes of this sort, styled the keeper of his conscience. In such case it is not ordinarily important whether the Chancellor acts as the special delegate of the Crown, or the King acts under his

[Green et al. vs. Allen et al.]

sign manual, through his Chancellor guiding his discretion. In practice, however, it has been found very difficult to distinguish in what cases the one or the other course ought, upon strict principles of prerogative, to be adopted. For where money has been given to trustees, for charity generally, without any objects specified, the charity has been sometimes administered by the King under his sign manual and sometimes by the Court of Chancery." The author then refers to the principle, as extracted from an examination of the cases, by Lord Eldon, before referred to, and recognizes it.

The question is, however, of very little importance, for the case now under consideration. All the authorities, and all the comments thereon, clearly establish the position, that, be it by the one or be it by the other, it is a prerogative exercise of power: in the one case by the King himself in person, by virtue of his sign manual, and in the other by the Chancellor, by virtue of the prerogative delegated to him, and upon information received through the Attorney General.

Mr. Story, in §1188 of his work upon Equity Jurisprudence, says: "The jurisdiction exercised by the Chancellor under the statute of 43 Elizabeth, ch. 4, over charitable uses, is held to be personal in him and not exercised in virtue of his ordinary or extraordinary jurisdiction in chancery, and in this respect resembles the jurisdiction exercised by him in the cases of idiots and lunatics, which is exercised purely as the delegate of the Crown. 3 Blacks. Com. 427, 428.

Mr. Maddox, in his work upon Chancery, 2nd vol. 721, says: "The administration of idiots and lunatics by the Chancellor, is in virtue of personal authority given by the Crown." 2 Atkins, 553; 19 Vesey, 122.

Mr. Story, in §1191 of the same book we have so frequently quoted, observes: "But when a charity is definite in its objects, and lawful in its creation, and is to be executed and regulated by trustees, whether they are private individuals or a corporation, then the administration properly belongs to such trustees: the King, as *Parens Patriæ*, has no general authority to regulate or control the administration of the funds." The same author also says, in §1141, that "the construction of char-

[Green et al. vs. Allen et al.]

itable uses, in former times, was pushed to the most alarming extravagance. And although it has been in a great measure checked, in later and more enlightened times, there are still some anomalies in the law upon the subject, which are hardly reconcilable with any sound principles of judicial interpretation, or with any proper exercise of judicial authority."

As has been heretofore observed, the conveying of lands to charitable uses is certainly liable, in many respects, to the same objections and the same abuses, as conveyances in mortmain: accordingly we find that the statute of 9th George 2nd, ch. 26, has been passed upon the subject, not indeed prohibiting such conveyances, but restraining them. This statute, after reciting "that gifts or alienations of lands in mortmain were prohibited by *Magna Charta*, and other wholesome laws, as prejudicial to the common utility, and that such public mischief had greatly increased, by many large and improvident dispositions, made by languishing or dying persons to charitable uses, to take place after their deaths, to the disherison of their lawful heirs, enacts, that after the 24th day of June, 1736, no lands or hereditaments whatsoever, nor any sums of money, or any other personal estate whatsoever, to be laid out or disposed of, in the purchase of any lands or hereditaments, should be given, or in any other way conveyed to, any person or persons, body politic or corporate or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered, by any person or persons whatever, in trust or for the benefit of any charitable use whatever; unless such gift or conveyance of any such lands or hereditaments, sums of money or personal estate, (other than stocks in the public funds,) be made by deed executed in the presence of any two or more creditable witnesses, twelve calendar months before the death of such donor or grantor, and be enrolled in the Court of Chancery within six months next after the execution thereof; and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, or agreement whatsoever, for the benefit of the donor or grantor, or of any person claiming under them: and declares all gifts, grants,

[Green et al. vs. Allen et al.]

conveyances, appointments, transfers, and settlements, whatsoever, of any land or other hereditaments, or of any estate or interest therein, or any charge or incumbrance, affecting any lands or hereditaments, or of any stock money or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands or hereditaments, or of any estate or interest therein, or of any charge or incumbrance thereon, to, or in trust for, any charitable use, made in any other manner or form, than by the act directed, to be absolutely and to all intents and purposes null and void.

Although this statute contains no express words prohibiting a bequest of money, to be produced by the sale of lands, for charitable purposes, yet it is settled by construction, that such bequest is within the spirit and meaning of the law. Thus where a testator devises all his real estate to his executors, in trust, to sell, and after the payment of certain legacies bequeathed, the money to arise by the sale of his real estate, and the intermediate rents, and all his personal estate, to his executors in trust, to pay one moiety, to the Governor of Bethlehem Hospital, for the support and benefit of the incurable lunatics, and the other half to the Treasurer of St. George's Hospital, to be applied in carrying into effect the designs of that Hospital. The case was held to be clearly within the act, which prevents both the conveyance of land, and the charging of land for charitable purposes. *Ambl. 20*—See also 2 *Vesey, Sen.*, 52: *Shelford on Mort.* 165. Such it seems to me is the common and statute law of England upon the subject of charitable uses.

Let us endeavor to reduce it to a few general propositions, so far as it is applicable to the present case.

Devises or donations to charitable purposes, are not within the operation of the statutes of Mortmain. If the charity be created either by devise or deed, it must be in favor of a person having sufficient capacity to take as devisee or donee, or if it be not to such person, it must be definite in its object, and lawful in its creation, and to be executed and regulated by trustees, before the Court of Chancery can, by virtue of its extraordinary jurisdiction, interfere in its execution. All charities, not supported by trustees, (unless in favor of an individual

[Green et al. vs. Allen et al.]

or a corporation, having power to implead and be impleaded,) if of a general indefinite purpose, are administered by the Chancellor under the sign manual of the King. All charities supported by trustees, with general objects, or some particular object pointed out, are administered by the Chancellor by original bill, upon information of the Attorney General, who acts for and in behalf of the King, and is a party thereto, and the jurisdiction in the two latter class of cases, arises out of delegated prerogative. And finally, that no gift, grant, conveyance, appointment, transfers or settlements of any lands or other hereditaments, or any moneys or other things arising out of them, is good and valid in law or equity, unless made twelve months before the death of the donor or grantor, and registered in the Chancery Court within six months thereafter.

The second proposition to be discussed is, what portions of the law, as thus fixed in England, are in force and obligatory in the State of Tennessee.

The 1st Statute (and the only one necessary to be examined for the present purpose) establishing and defining the jurisdiction of the Court of Chancery in North Carolina, was passed in 1782, ch. 11. After the preamble, that courts of law, as at present established, are not equal to the redress of all kinds of injuries, but many innocent men are withheld from their just rights, and some deprived of them altogether, for want of a Court or Courts of Equity, it provides, "That from and after the present session of the General Assembly, each Superior Court of law in this State, shall also be made and act as a Court of Equity for the same district, and possess all the power and authority within the same, that the Court of Chancery, which was formerly held in this State under the late Government, used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws in force in this State, and not inconsistent with our present constitution."

What were the powers and authorities used and exercised by the Court of Chancery, held in the Colonial Government of the Province of North Carolina, we have now no means of ascertaining. The probability is, that they did not embrace, either the ordinary jurisdiction of the Chancellor in England,

[Green et al. vs. Allen et al.]

or that arising from a delegation of the *prerogitava regis*, inasmuch as the exercise of these branches of jurisdiction in England arose out of the peculiar relation which existed between the Chancellor and King, fixed by long usage and custom, and in connexion with a state of affairs, which could not have existed between a Court of Chancery and the lords proprietors and governors of N. Carolina. But be this as it may, the restriction in the act of 1782, that the jurisdiction is not to be inconsistent with the Constitution of the State, necessarily cuts off both these sources; because upon the successful event of the revolution, our whole form of government changed, and there ceased to be any branch of executive prerogative, in relation to the administration of justice, to be delegated to a Chancellor, and also the whole system out of which his common law power arose was thoroughly prostrated. I, therefore, think it may be well assumed, that by a fair and legal construction of the act of 1782, no power but the extraordinary was conferred upon the Courts of Chancery in North Carolina; none has been conferred since, in relation to the subject under consideration. And we are, therefore, of opinion, that an attempt by a Court of Chancery, in this State, to exercise jurisdiction over the subjects of charities, beyond what would have been warranted by the extraordinary power of the Chancellor in England, is not justified by any of our statutes creating them, nor by the practice, nor usage.

But it has been urged, the statute of 43d Eliza. ch. 4, is in full force in this State, and that under its provisions the jurisdiction contended for is in existence. To this proposition I cannot accede; because, in the first place, to say the least of it, it is very doubtful, whether this branch of the Chancellor's jurisdiction could have been derived therefrom; it certainly was not, unless it were by usurped construction; for this statute, as has been observed, was entirely of a remedial character, and only contemplated a speedy and effectual remedy for the abuse of trusts for charitable purposes, which had been or might be created, viz, by commission, under the superintendence and control of the Chancellor.

The powers given by the statute of 43d Eliz. ch. 4, have

[Green et al. vs. Allen et al.]

fallen into disuse in England, as we have seen, since it was held that the Chancellor had power by original bill, in the nature of an information, to effectuate the same ends designed by the statute. And the consequence is, that the question in controversy, in the present case, is not whether the statute is in force, but whether the practice of the Chancellor under it, is to be enforced in this State. I hold that it is not. Because, as has been said, the statute did not warrant the practice, but by usurpation under its construction, and because we have not the machinery necessary to carry into execution the practice. We have no *parens patriæ*. We have no Attorney General representing the executive, who can, as such, give information by bill, for the establishing and enforcing of trusts for charitable purposes. And the necessary consequence is, that the superstruction must fall with the basis upon which it rested. But in addition to this, if this doctrine be recognized as in force in this State, we will necessarily be involved in much difficulty, upon the subject of what are charitable uses, in contradistinction to what are superstitious, unknown in England, and which will open a door to such conveyances, productive of consequences, startling in their effect and operation, and which we apprehend, those most in favor of the system would shrink from.

By the 2d section of our Bill of Rights, it is provided, "That all men shall have a natural and indefeasible right, to worship Almighty God according to the dictates of their conscience; that no man of right can be compelled to attend, erect or support any place of worship, or maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law, to any religious establishment, or mode of worship."

It cannot require argument to show, that the whole distinction existing in England, between trusts, charitable and superstitious, is broken down by this section of our Bill of Rights; and that the ground over which charitable trusts are to be spread, are tremendously extended, if we adopt the English practice upon the subject. Every creed of religion is neces-

[Green et als. vs. Allen et als.]

sarily embraced by it, and every institution calculated to promote it. We may, therefore, look for bills to establish charities for Roman Catholics, Jews, Mormons, Mahomedans, Universalists, Unitarians, Deists, *et id omne genus*, as far as the imagination of man may be enabled to invent new forms or creeds. The system is at war with our habits, our form of government, and indeed, we think we may add, with common sense and reason, and cannot be enforced in our State. But let us test the devise in the particular case under consideration, by the English system. The words are, "I direct my executor to sell my mill, with the appertenances, and all and every species of property found in my possession at the time of my death, and not otherwise disposed of, and give one-fourth of the proceeds arising therefrom to the Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said Conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of, as the Tennessee Annual Conference may deem best in their wisdom."

Now, it may be well doubted, whether the last clause of the devise, viz, "And to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom," does not control the preceding claims of the devise to schools and missionary society, and leave it, charity at large, to be disposed of by the Annual Conference of the Methodist Episcopal Church of Tennessee, for "benevolent purposes;" and therefore falling within the class of uses and trusts, not charitable, and not recognized by the Chancery Court of England, of which we have heretofore treated in this opinion sufficiently for the understanding of this proposition. But it is certain, that, put what construction you may upon it most favorable to its maintenance, it must fall within the rule, as established by Lord Eldon, and recognized by Mr. Story, that it is a general indefinite purpose of charity, not fixing itself upon any particular object, and unsupported by trustees to the uses, the disposition and administration of which, in England, would have been by the King under his sign manual, by virtue of his prerogative, as *parens*

[Green et al. vs. Allen et al.]

patrie, and cannot be sustained by a Court of Chancery, in virtue of any power recognized in this State.

But to illustrate still further. Under what rights do the complainants come into this court? They are not trustees of the charity under the will, and they have no legal or equitable interest in it: it is said by virtue of the act of the Legislature of the State of Tennessee, passed on the 23d day of December, 1841, appointing them trustees to receive the charity. To this, then, there are two objections.

1st. The charity must stand or fall, as it was found to exist at the death of the testator. If it were not then legal and valid, no subsequent statute of the legislature can make it good, as it would be legislative action upon a subject beyond its control.

2nd. Because the act of 1841 is unconstitutional and void, under the 7th section of the 11th article of our amended Constitution, which provides, "That the legislature shall have no power to pass any law for the benefit of individuals, inconsistent with the general laws of the land, nor to pass any law granting to any individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community, who may be able to bring himself within the provisions of this law."

But it has been contended, that the executor of the will in this case is the trustee for the charity. This clearly is not so. He is directed to pay it to the Tennessee Annual Conference of the Methodist Episcopal Church, which is to appropriate it as devised. This would constitute the Tennessee Conference of the Methodist Episcopal Church the trustees for the charity, if it could legally be so, which it cannot, from not being incorporated, and cannot therefore be looked upon by this court as having any legal existence whatever.

I have not deemed it necessary to enter into an examination of the American authorities upon this subject; they certainly do not conflict with the general views of this opinion, upon the nature and the source of the jurisdiction of the Chancellor in England in enforcing charities, viz, delegated prerogative. The Assistant Vice Chancellor of New York, in the conclusion of his elaborate opinion in the case of *Wright and others vs. The*

[Green et al. vs. Allen et al.]

Trustees of the Methodist Episcopal Church, 1 Hoffman's Rep. 265, in which he has brought under review most of the cases, observes: "With respect to the mode of enforcing the rule, it seems now admitted in England, that if there is no trustee, and the object is wholly undefined, the King administers the charity under his sign manual as *parens patriæ*. And in the case of *Morrell vs. Lawson*, 5th Vin. Abr. 500, Lord Chancellor Parker says, that when a bill is brought to establish a charity given by will to persons uncertain, and incapable of suing or being sued, the suit must be in the name of the Attorney General *ex necessitate rei*: because there are no certain persons entitled to it, who can sue in their own names." But the Vice Chancellor in continuation observes; "There is ample authority in our own country to establish, that the States now represent that particular branch of the royal power as *parens patriæ*." To this portion of the opinion I have not been able to yield my assent: that is, that the States do represent that branch of royal prerogative. I admit there are American decisions sustaining charities, which could only have been decreed in England under the prerogative. To which, all I have to say is, that if the courts that made them, felt satisfied that they had the jurisdiction, and the necessary machinery for a correct exercise of it, I do not object to them, but cannot hold them obligatory on us: because I am satisfied that no such jurisdiction has been intrusted to us, and that we have no system, by means of which a proper exercise of it could be ensured, if it had. And I feel no disposition to strain after power to enforce a bequest, so objectionable in all points as the present, and one which, even in England, would now be held void under the statute of George the 2nd.

Upon the whole, therefore, I consider the devise void and inoperative; that the executor holds the proceeds under it, as he does the balance of the estate, subject to distribution among those entitled to it by the law; and am, therefore, in favor of sustaining the demurrer and dismissing the bill with costs.

JUDGE REESE delivered a verbal opinion, in which he concurred in the general propositions laid down in the opinion de-

[Green et al. vs. Allen et al.]

livered by Judge Turley, and in the propriety of affirming the decree of Chancellor McCambell.

JOHN J. WHITE, Special Judge, delivered the following opinion.

This is a bill filed by A. L. P. Green and others, Trustees appointed by an act of the General Assembly of the State of Tennessee, in December 1841, for the purpose of receiving the donation under the will of William Wright, deceased, and as members of the Tennessee Conference of the Methodist Episcopal Church, in behalf and by order of the Conference, and Robert R. Roberts, President of the Missionary Society of the Methodist Episcopal Church, and Senior Bishop of said Church in behalf of said Society, against the Executor and heirs at law of William Wright, deceased.

The object of the bill is, to establish the validity of the bequests contained in the will, to the Tennessee Conference and to the Missionary Society of the Methodist Episcopal Church; and that the Executor may account to complainants, in behalf of the Conference and Society, for that portion of the fund which has been bequeathed to them; and they pray for general relief.

It appears from the exhibits in the bill, that the boundaries of the Tennessee Annual Conference include Middle Tennessee and North Alabama.

It also appears, that the Conference consists of all the traveling Preachers who are in full connection, and those who are to be received into full connection with that body; that the Methodist Episcopal Church consists of 34 Annual Conferences, and that the Tennessee Conference was organized more than thirty-one years ago.

It also appears, that the Missionary Society of the Methodist Episcopal Church, has its annual election of officers in the city of New York, and that it is managed by a President, Vice President, Treasurer and Assistant Treasurer, Secretary and thirty-two Managers—and that the Association is established for the purpose of enabling the several Annual Conferences

[Green et al. vs. Allen et al.]

more effectually to extend their missionary labors throughout the United States, and elsewhere; and also to assist in the support and promotion of missionary schools and missions, in this and in foreign countries.

It also appears, that the Board has authority to appropriate money to defray incidental expenses; to provide for the support of superannuated missionaries, widows and orphans of missionaries, who may not be provided for by the Annual Conferences; to print books at their own press for the benefit of Indian and other Foreign Missions, &c.

The defendants demurred to the bill in the court below; the Chancellor sustained the demurrer and dismissed the bill, from which complainants appealed to this court.

The provisions of the will, which is dated 25th July, 1840, so far as this case is concerned, are as follows:

Item 4th. "I desire that my mill, with the appurtenances thereto, and all and every species of property found in my possession at my death, not otherwise disposed of, shall be sold.

Item 5th. "I desire that one-fourth of the money arising from the sale of all the property disposed of as above mentioned, shall be given to the Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of Institutions of learning under the superintendence of said Conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom.

Item. 7. "I leave my trusty friend, Nathaniel H. Allen, executor to this my last will and testament."

This will was made by a competent testator, has been executed according to all the forms of law, and regularly admitted to probate in the county of Montgomery, where the testator died, at the August term, 1840, of the court, and the question now is, shall this bequest contained in it be sustained?

The questions involved here, are of deep interest; they have been discussed by the counsel, with signal ability, and I have given them a laborious and careful examination.

The general and obvious rule, which has always governed the courts, is to endeavor to carry into effect the intention of the

[Green et als. vs. Allen et als.]

testator; and all the guards which have been thrown around the execution of wills by the law, have been for the purpose, the more effectually to secure that object. And this accords with the best interests of society, that the same freedom which is secured to every man in the acquisition of property, should be continued to him in its ultimate disposition, for without that the former is essentially impaired, and you take from the citizen the highest motive to useful and honorable exertion. And such is the irresistible influence of family and social relations, there is but little danger to be apprehended of any man's disinheriting the proper objects of his bounty. See 4 Kent's Comm. 501, 4 edition. But at the same time, there is another rule which should never be lost sight of by the court, that this testamentary disposition should be in accordance with, and not repugnant to the rules of law. *Legum servanda fides, suprema voluntas, quod mandat fierique jubet parere necesse est.* 7 Bacon's Abr. 342.

And I would remark in the outset, that we are not involved here in any discussion in regard to perpetuities, or the conveyance of real estate, for the express direction of the testator to sell the property, and to pay over the proceeds of the sale to the objects specified in the 5th and a subsequent clause in the will, has changed the character of the real estate and converted it into personalty. It operates as "a conversion out and out," and makes the question here, solely one in reference to the bequest of personal property. It is said by Sir William Grant, Master of the Rolls, in *Berry vs. Usher*, 11 Ves. 91, that where it clearly appears to have been the intention of the testator, to impress upon real estate the character of personal estate to all intents and purposes, the mere appointment of an executor will be sufficient to carry that property to him either for his own benefit, in cases where he is beneficially entitled to the personal estate, or as a trustee for others, where he holds the personal estate on the like trust. See 1 Roper on Legacies, 341, *et seq.* 1 Williams on Ex'rs, 417, 418.

This brings us to the important question whether this is a good bequest contained in this will, and whether it is of such a

[Green et als. vs. Allen et als.]

character, that the trusts created by it will be sustained and enforced in a Court of Equity?

And, 1st. In regard to the *objects* of the bequest. It cannot be denied that they are of the most beneficent character. It is for the benefit of institutions of learning under the superintendence of the Tennessee Annual Conference of the Methodist Episcopal Church, and to the Missionary Society of the Methodist Episcopal Church. In other words, the object of the testator, in making the bequest, is to advance the cause of human learning, together with the spread of the Gospel, and the consequent improvement and amelioration of our race. Letters promote civilization, and when connected with the christian religion in all its unapproachable beauty and grandeur, the result is the highest and most perfect state of human society. According to Lord Coke, in *Porter's case*, 1 Coke, part 1, p. 24, there was no time so barbarous as to abolish learning and knowledge; much more in this enlightened day, do they demand encouragement and support from every virtuous citizen.

We need not go back to a remote antiquity for authority upon this subject, for we find these principles incorporated into our fundamental laws. So strongly impressed were the framers of the amended Constitution of Tennessee, with the importance of these objects, that by an express provision, they made it "the duty of the General Assembly, in all future periods of this Government, to cherish literature and science." See Art. 11, sec. 10. This to be sure is merely a direction to the legislature, but it nevertheless indicates the popular feeling and the public policy upon this great question.

The act too of the General Assembly of the State, passed in December 1841, (See Acts of Tennessee, 1841-2, p. 23,) appointing trustees to receive and administer this charity, although not to be regarded for any other purpose, may still be appealed to, as furnishing evidence in favor of the character of the bequests contained in the will.

In the Constitution of the United States, (amendments, Art. 1, sec. 1,) is the following provision: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." And in the Declaration of Rights, pre-

[Green et al. vs. Allen et al.]

fixed to the Constitution of Tennessee, it is declared, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience;" "That no human authority can, in any case whatever, control or interfere with the rights of conscience: and that no preference shall ever be given, by law, to any religious establishment or mode of worship." Sec. 3. The great principle then of religious freedom, as I believe, which is secured and guaranteed by the Constitution, authorized the testator to make this bequest, for the purposes mentioned in the will, and to place the same under the control of any religious denomination whatever.

But although the object of the bequest is such a one as must commend itself to the regard of an enlightened judiciary, being unquestionably for pious and charitable uses, according to all the authorities, the important enquiry still remains, whether the testator has made this disposition in such a way that it is valid and can be enforced by this court?

The argument on the part of the defendants, is,

1st. That these Societies, to whom the bequest is made, are mere voluntary associations, unincorporated, and not capable in the law of taking the bequest, and that the same is therefore void. And

2nd. That there are no trustees created by the will; no legatee to take; nor any trust declared with sufficient certainty, nor the manner of its execution, but that it is altogether vague and indefinite, resting upon an arbitrary and uncontrolled discretion; and consequently invalid and not to be enforced in a Court of Equity.

And this brings me to the next question which I propose to examine, which is, whether this court by virtue of its common law powers, independent of the Statute of 43 Elizabeth, ch. 4, in regard to charitable uses, has not the power to execute and enforce the trusts contained in this will? Upon principle it would seem, that a Court of Equity must possess the power independent of positive statute, for one of the most fruitful, as well as acknowledged sources of equity jurisdiction, has always been the execution of the trusts of a will or other instrument, according to the intention expressed in that will or instrument.

[Green et al. vs. Allen et al.]

Attorney General vs. Iron Mongers Company, 2 Mylne & Keen, 581: 2 Story's Eq. Jur. 534, edition of 1843. The jurisdiction of chancery over trusts was never questioned by the most strenuous advocates of the common law, says Mr. Justice Baldwin, in the case of *Sarah Zane's* will, p. 50, and which he supports by reference to numerous authorities. In the present case, the object of the testator is palpable, and he is exercising an acknowledged right in the disposition of his property. Suppose that for want of adequate information at the time, or the necessary legal assistance, being *in extremis*, some matter of form should be neglected, as for instance, the appointment of a competent trustee as contended for, shall this accidental omission frustrate his will and cause the bequest to fail, or would not the court in the exercise of its acknowledged powers, remedy this defect if it existed, and carry out the intention if not illegal? In this case, however, as I regard it, no such defect exists, nor is any such power necessary to be exerted by this court. It seems to me that the power which this court is now called upon to exercise in reference to this will, must be regarded as one of the inherent, substantive, independent powers of a Court of Equity.

That a trust was intended to be created by the testator there can be no question. He directs that one-fourth of the money arising from the sale of the property mentioned, "shall be given to the Tennessee Annual Conference of the Methodist Episcopal Church for the benefit of Institutions of learning under the superintendence of said Conference." Here the fund is pointed out, the object to which it is to be applied, and the body which is to have the control and superintendence of the same. What more is necessary to constitute a good and valid trust? Is it to be expected that a man, by his will, would point out the exact specific application of the fund?

The bequest adds, "And to the Missionary Society of the Methodist Episcopal Church." This Association is described with sufficient accuracy to be clearly understood, which is all that is necessary. See 4 Wheat. 28. It is true there is no specific direction given in regard to the application of this part of the fund, except in the language before-mentioned—nor was

[Green et als. vs. Allen et als.]

any such direction, as I believe, necessary, nor could it have been expected to be given, as already intimated, in a last will and testament. It does not purport to be given to the individuals composing the Society as their own property, but to the Society itself, of course in their aggregate capacity and for the purposes of the Society, and to have specified them would be superfluous. The words used themselves, *ex vi termini*, are sufficient to create a trust. They import that the fund is to be applied by the Society, and for the purposes for which that Society was organized, which are admitted in the pleadings to be for the support and promotion of Missionary Schools and Missions, Printing Books for the benefit of Indian and other Foreign Missions, and for the purpose, in short, of the more effectually extending their missionary labors throughout the United States and in foreign countries. The testator must be presumed to be acquainted with the objects for which the Society was organized, and that he desired to have the fund applied to those objects. It is like "a devise to a hospital, or any known institution; it is for the uses and purposes intended by the founder." So here, the bequest "to the Missionary Society of the Methodist Episcopal Church," must be for the purposes contemplated by that Society, and can be applied to no other. And upon a case being made out of an abuse, or misemployment of such a charity, or an invasion of their rights, a Court of Equity will afford relief. 2 Peters, 584-5: 9 Cranch, 43: 9 Cowen, 482: 7 Vermont Rep. 285, 310: 1 Atkyns, 356: 3 Merivale, 400: 1 Chancery Cases, 134, 193: 1 Eq. Cases Abr. 99, 3 Peters, 499: Ambler, 526: 16 Ves. 321.

It is true that the will proceeds, "And to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom." But I take it this general, indefinite direction, cannot control or render nugatory the direct and specific appropriation of the fund which had been before made. It is a rule, that general words in a will may be restrained to make the whole will consistent. 6 Ves. Jr. 129: 7 ditto, 403: 10 do. 595: 7 Bacon, 341. And again: general and doubtful words in a will shall not alter an express devise before, nor carry any thing contrary to the apparent intent. 7 Bac. 342. Nor can

[Green et al. vs. Allen et al.]

an express disposition be varied by inference or argument from other parts of the will. 2 Williams on Ex'rs, 716: 1 Ves. Jr. 269: 8 ditto, 42. This general clause, then, must be regarded as subordinate and subject to the specific bequest contained in the will, and cannot in any respect alter the law which arises upon it.

It seems to me, then, upon principle, that this is a good trust, created by the will; it has been defined with sufficient certainty, the property and the way it is to go indicated, which the court can see, and by virtue of its general jurisdiction over trusts, enforce the same, and cause the fund to be applied to the objects intended. Even if no trustee was appointed, or the trustee was incompetent to take, the bequest would not upon that account fail, for it is the trust and not the trustee that gives a Court of Equity jurisdiction, and when necessary the court will appoint a trustee to execute the trust. 4 Dana, 358, *Moore vs. Moore*: 9 Cowen, 484, *McCartee vs. Orphan Asylum Society*: 3 Edwards, 79: 2 Peters, 583: 2 Kent, 286, note, 288, note: 7 Vermont, 294: 3 Yerg. 268.

In this case however, as it is believed, the executor has full authority under the will to sell and convert the estate into money, and that he will then hold the fund as trustee for the legatees. 3 John. Ch. 215: 10 Yerg. 104: 4 Dana, 358: 2 Peere Williams, 211: 1 Atk. 458. And when the fund is paid over by the executor to the proper officer of the different Societies, these Societies will then hold the fund as trustees for the purpose of carrying into effect the declared intention of the testator.

I will now proceed to examine this upon authority. In the opinion of distinguished jurists, the leading principles in regard to charities have been drawn from the civil law and engrafted into the common law. This was the opinion of Lord Thurlow, in *White vs. White*, 1 Br. Ch. Cas. 12; and that of Lord Eldon, in *Moggridge vs. Thackwell*, 7 Ves. 36, 69; and likewise of Mr. Justice Story, 2 Story's Eq. 489. These principles, however, may no doubt be traced to a still higher source, the christian religion, and were engrafted from that upon the civil law. See 1 Hoffman, 245. And from the time of Justinian, it became a fixed maxim of Roman jurisprudence, that

[Green et al. vs. Allen et al.]

legacies to pious uses, which included all legacies for works of piety or charity, were regarded with peculiar favor. 2 Dom. Civil Law Book 4, p. 168, 170. The same rule has been adopted into the common law, with regard to charities, and has universally received the sanction of the English courts, and of the highest judicial tribunals in the Union. 2 Story, 490, 512. The reason of this is obvious, for they benefit society, advance civilization, and are injurious to none.

The sources of information in regard to the early exercise of powers by a Court of Chancery are necessarily very obscure, as the Reports of adjudged cases in chancery are exceedingly imperfect until after the restoration. 1 Kent, 492, *Sarah Zane's will*, 50. But still there is the highest authority in favor of the original, inherent, and necessary jurisdiction of a Court of Chancery over bequests and devises in trust for charities as well as other objects. Lord Northington in the case of the *Attorney General vs. Tancred*, 1 Eden, 10, 1 Wm. Black. Rep. 91, states it to have been the uniform rule of the Court of Chancery before, as well as at and after the Statute of Elizabeth, when the uses were charitable, and the grantor competent to convey, to aid even a defective conveyance to uses. Sir Joseph Jekyll, in *Eyre vs. Countess of Shaftsbury*, 2 Peere Wms., 119, speaks of it as "an original right" in a Court of Chancery, and that "abstracted from the Statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery in the Attorney General's name for the establishment of charities." Lord Chancellor Somers, in the case of *Falkland vs. Bertie*, 2 Vernon, 342, speaking of things that fall under the care and direction of a Court of Chancery, among others, mentions that of "charities." Lord Redesdale, in the case of the *Attorney General vs. Mayor of Dublin*, 1 Bligh's Rep. 347, in speaking of the Statute of Elizabeth, with respect to charitable uses, says, "That statute only created a new jurisdiction; it created no new law. It created a new and auxiliary jurisdiction, a jurisdiction created by commission, &c.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor," &c. In *Duke on Char. uses*,

[Green et als. vs. Allen et als.]

163, it is stated, that Symons sold lands, by bargain and sale, to Fleming, upon trust to perform a charitable use which the testator declared by will. The deed was void for want of enrolment, and yet the Lord Chancellor decreed a sale of the lands by the heir, to be applied according to the limitation of the use. This was in the 24 Elizabeth, and before the statute of charitable uses, and shows conclusively the common law jurisdiction of Courts of Chancery at that time, in sustaining defective conveyances to charitable uses. In *Attorney General vs. Middleton*, 2 Ves. Sr. 327, Lord Hardwicke held, in cases of charities *at large*, and not regulated by charter, the Court of Chancery before, and independent of the Statute of Elizabeth, exercised original jurisdiction. Chancellor Kent, 2 vol. 288, says, "It would appear from the preamble to the Statute of Elizabeth, that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for the breaches of those trusts." And adds in a note, "the statute defined the charities which chancery would protect, and were to be enforced; but the better opinion is, that it left the jurisdiction as it existed prior to the statute untouched."

I deem it unnecessary to refer minutely to all the cases that have been decided by the English courts, where charities have been sustained upon common law principles, and under the general powers of a Court of Equity, independent of the statute of 43 Elizabeth. A brief reference to a few others must suffice. The case of *Mayor and Burgesses of Reading vs. Lane*, 43 Elizabeth, Tothill 34, was a devise to the poor people maintained in the hospital of the Parish of St. Lawrence in Reading forever. This was sustained. See too the case of *Palmer vs. Newman*, 21 and 2 of Car. 2, 1 Ch. Cas. 157, in which it was declared by the court, that the King as *pater patriæ* might inform for any public benefit for charitable uses, before the statute for charitable uses. Also the *Attorney General vs. Combe*, in 1679, 2 Do. 18, where a devise to charity was decreed, which was not within the statute of 43 Elizabeth. Also the *Poor of the Parish of Dunstan vs. Beauchamp*, 1 Ch. Cas. 193. The decree had been made by commissioners upon the statute

[Green et al. vs. Allen et al.]

of charitable uses. Those for whom the decree was made brought an original bill to enforce it. It was decreed by the LordKeeper, that the decree of the commissioners should be confirmed. So the case of the *Attorney General vs. Matthews*, 2 Levinz, 167, where the residue was for the use of the poor forever. It was a case not within the statute of charitable uses, but a decree was made under the general powers of the court. In the case of the *Attorney General vs. the Master of Brentwood School*, 1 Mylne & Keen, 376, we see that a decree was made in Chancery, in the 12 of Queen Elizabeth, upon the will of Sir Anthony Brown creating a charity. See too the case of the *Thetford School*, reported in Popham, 6 and 7, and in Croke Eliz. 288, which arose upon the will of Sir Nicholas Fulmerston, which was made in 1566—And, also, the case of the *Attorney General vs. The Master and Wardens of the Skinner's Company*, 2 Russell, 407.

In addition to the foregoing I would remark, that a work has been published in England, under the authority of the Commissioners of Public Records, called "A Calendar of the Proceedings in Chancery in the reign of Queen Elizabeth, to which are prefixed examples of earlier proceedings in that court, from the reign of Richard 2d, to that of Queen Elizabeth, inclusive," which furnishes the most conclusive evidence of the correctness of the position here assumed. From this it appears, that the jurisdiction of a Court of Chancery in matters of trust, was fully established as early as the reign of Henry 6th, nearly a century and a half before the Statute of Elizabeth. (See a notice of this work in the London Jurist, 348, *et seq.*) And if in ordinary trusts, most assuredly the most important and highly favored of all trusts, that of charities, could not be excluded. Indeed two of the cases in that reign, are charities under a will, to wit, the case of *Babington vs. Gall*, and *Wakering vs. Bayle*. Vol. 1, p. 56-7. In the first case, the bill states, that plaintiff's mother had placed 600 marks in defendant's hands for the purpose of founding a chantry in the Church of St. Peters. The answer admits the trust, but adds, that if the endowment of the chantry was not completed within four years, the money was to be applied to other purposes, and concludes

[Green et al. vs. Allen et al.]

by submitting to pay the money according to the directions of the court. The latter case is a bill to compel the defendant, who is a feoffee in trust, to make an estate of certain lands, in Tottenham, to the Hospital of St. Bartholomew, for the endowment of a chapel there. Mr. Justice Story, in the opinion which he delivered in the Supreme Court of the United States, January term, 1844, in the great case arising upon the will of Stephen Girard, in speaking of this work, says, that in it are to be found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth, and that "they establish in the most satisfactory and conclusive manner, that cases of charities, where there were trustees appointed for general and indefinite charities as well as for specific charities, were familiarly known to, and acted upon and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. Whatever doubts, therefore, might properly be entertained upon the subject, when the case of *The Trustees of the Philadelphia Baptist Association vs. Hart's Ex'rs*, 4 Wheat. 1, was before this court in 1819, those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded." 2 Howard, 196. This language is the more important, because previously to this, Mr. Story had been inclined to concur in the opinion which he attributes to Lord Eldon, in *Attorney General vs. Bowyer*, 3 Ves. 714, 726, that prior to the time of Lord Ellesmere, who was made Lord Chancellor in 1596, bills were not filed in chancery to establish charities. See appendix to 3 Wheat. 487-8: 2 Story's Equity, 495-6, 3 edition. This suggestion, however, was not made by Lord Eldon, but by Lord Loughborough, as will be seen from the case before alluded to. It is evident that Lord Eldon was of a different opinion from the case of the *Attorney General vs. The Skinner's Company* 2 Russell, 407, which arose upon a will dated in 1558, anterior to the statute.

[Green et alia. vs. Allen et alia.]

The authority which is sometimes referred to in opposition to this view, and which seems to be so regarded by Judge Marshall, in the case of the *Baptist Association vs. Hart's Executors*, 4 Wheat. 35, is that of *Porter's* case in 1 Coke's Rep. 17, which was a case at law. It was in 34 and 35 Elizabeth, and consequently before the statute of 43 Elizabeth, ch. 4, in regard to charitable uses. This was a devise of lands devisable by custom to the testator's wife for life upon condition that she should assure the lands devised for the maintenance and continuance of a free school and certain almsmen and almswomen. The heir entered for condition broken, and conveyed the lands to the Queen. It was held that the use, being for charity, was good. Lord Loughborough in commenting upon it in *Attorney General vs. Bowyer*, 3 Ves. Jr. 726, says this case establishes the doctrine, "that if a feoffment is made to a general legal use, not superstitious, though indefinite, though no person is *in esse* who could be the *cestui que use*, yet the feoffment is good; and if it was bad, the heir of the feoffor would have been entitled to enter, the legal estate remaining in him." Now, this case may be regarded as important in one point of view, in answer to the argument which urges the indefinite character of the present bequest, against its effectuation, as it shows there was some tribunal at that time, competent to sustain it. Nor does it follow, because this was held to be a good charity in a court of law, that a court of equity, upon a proper case being presented, would not sustain and enforce a trust for charitable purposes, but rather the reverse, because relief would be much more effectual in a court of equity from the nature of its organization.

The principles involved in this case have been examined by Mr. Justice Baldwin of the Supreme Court of the United States, with unequalled learning and research, in the case of *Sarah Zane's* will, which was decided in 1833. She was of the city of Philadelphia, and among other things, made a bequest to the Society of Friends in the city of Philadelphia, for the relief of the poor members thereof—to that in Baltimore, towards their "stock," which was applied to the printing of books of a religious character, &c.—and to that in Virginia, towards the

[Green et als. vs. Allen et als.]

relief of the poor of the society, enlarging their meeting-house, &c. These societies were unincorporated. He says, that "the common law requires no charter to enable a body of men in any place to purchase chattels or receive donations of money, a chattel interest, or an estate for the lives of the grantees in land by their name as a body without other words; if one is necessary it can be only to give them some privilege, immunity or exemption from the rigor of the common law, so as to make them as a natural person capable of enjoying an estate in fee without words of inheritance." Pamphlet opinion, page 30. And again, that at the common law, "charities were left free for the exercise of the jurisdiction of the respective courts, which in all cases gave effect to the disposition of a testator, whenever his intention was expressed, or could be collected from the will, notwithstanding any defect in form, or the want of naming or designating an object to take; they would give it locality and application to those persons or bodies who were capable, if they could by any reasonable intendment be brought within the devise." P. 47. He shows too that the general course of equity before the 43 Elizabeth, in all cases of charities, was according to rules and principles as well settled and defined as on any other subjects, and was the basis on which the law now stands on the construction of that statute. The bequests in this will were sustained, and the administrator with the will annexed was directed to pay the respective bequests to the persons appointed to receive and distribute them. See Coke upon Littleton, 3, A.

Questions in regard to charities have frequently come before the enlightened courts of the state of New York. In *Potter vs. Chapin*, 6 Paige, 649, the Chancellor says: "although some doubt was thrown upon the question of charitable donations for the benefit of a community or body not incorporated so as to be capable of taking and conveying the legal title to property by the decision of the Supreme Court of the United States in the case of *The Baptist Association vs. Hart's Executors*, 4 Wheat. 1, I believe it is generally admitted that the decision in that case was wrong. And it may now be considered as an established principle of American law, that the Court of Chancery

[Green et aln. vs. Allen et aln.]

will sustain and protect such a gift, bequest or dedication of property to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is specific and capable of being carried into effect according to the intention of the donor." And the fund was directed to be paid over to the trustees of the school districts.

In 7 Paige, 79, *Dutch Church vs. Mott*, it is decided that the statute of Elizabeth relative to charitable uses was never in force in the state of New York. But independently of that statute, the Court of Chancery had an original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses.

The case of *King vs. Woodhull*, 3 Edwards, 79, was decided by the Vice Chancellor of the State of New York. That was a bequest not to a trustee, but immediate, to an unincorporated voluntary association, the Home Missionary Society, where neither the object of the bequest was specified, nor any purposes to which the money was to be applied. The Vice Chancellor says, the testatrix must be supposed to know the purposes for which the society was formed, and to what objects and uses its funds were applied; that it was manifestly her intention to aid the funds of the society and promote its usefulness by the donation; that by looking into the fundamental articles of the society, the objects of it may be seen and understood—(which were to afford assistance to religious congregations which were unable to support a gospel ministry, and to send the gospel to the destitute within the United States)—and that it will thus be seen to be a public charity neither inconsistent with law nor against public policy. And he sustained the bequest, upon the general jurisdiction of the court independent of the statute of 43 Elizabeth—and the money was directed to be paid by the executors to the treasurer of the society as a valid bequest to a charitable use.

In *Coggeshall vs. Pelton*, 7 Johns. ch. 292, a pecuniary legacy to the town of New Rochelle for the purpose of erecting a town house for transacting town business, although no trustee was named, was held valid as a charitable bequest, in the exercise of the common law powers and jurisdiction of the court.

[Green et als. vs. Allen et als.]

In *Wright and others vs. Trustees of Methodist Episcopal Church*, 1 Hoffman, 205, which was a bill filed by the executors for the purpose of obtaining the directions of the court as to the distribution of the surplus fund of the estate of the testator in their hands, one question was as to the validity of the bequest of the residue to "the yearly meeting of friends in New York," which was a voluntary unincorporated society. The question is ably examined, and the conclusion is, that the power to enforce such a charity is in the court by virtue of its original constitution, independent of the statute. The bequest was held valid, and it was declared, that payment to the treasurer would be a full protection to the executors. See too the case of *McCartee vs. Orphan Asylum Society*, 9 Cowen, 437, in which Chancellor Jones vindicates the jurisdiction of a court of chancery over charities anterior to the statute of Elizabeth. This case was reversed on appeal to the Court of Errors upon other grounds, but the opinion of the Chancellor upon this point not questioned.

In Pennsylvania, where it has been decided that the statute of 43 Elizabeth, ch. 4, is not in force, it was held that a bequest "to St Michael's and Zion's Churches," to be laid out in bread annually for ten years "for the poor of the Lutheran congregation," and likewise a bequest for the education of young students in the ministry of the German Lutheran congregation, were good. The Chief Justice, in delivering his opinion, seems inclined to go further than they have in England in adjudicating upon that statute; for he intimates that a bequest such as in *Morrice vs. The Bishop of Durham*, 9 Ves. 399, would be supported by that court. The Chief Justice adds: "It is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking, or not, or how uncertain the objects may be, provided there be a discretionary power vested any where over the application of the testator's bounty to those objects. If the intention sufficiently appears in the bequest, it would be held valid." *Witman vs. Lex*, 17 Serg. & Rawles, 93.

In Massachusetts, similar adjudications have been made. *Burbank vs. Whitney*, 24 Pick. 146, was a bequest to the Amer-

[Green et al. vs. Allen et al.]

ican Bible Society, and to the American Home Missionary Society, voluntary associations. The executor had paid over the bequests to the societies. The Probate Judge allowed the account of the executor, from which there was an appeal. The court say there is no doubt that donations to charitable purposes were held valid previous to the statute of Elizabeth, and that they were good although the charity was to be distributed by a society or body of men who were not incorporated, and although no person was *in esse* who could be the *cestui que use*. They proceed however to say that the statute of Elizabeth had been adopted in principle and substance in the State, and that it was clear that the payment of these legacies might be enforced by the court as a court of equity. "By the will a trust was created; and on the death of the testator the legal estate vested in the executor, and not in the legatees. He held it in trust for them and was bound to collect and pay over the money according to the directions of the will. And this trust the executor might be compelled to perform by the court as a court of equity, if he had not performed it voluntarily." P. 153. But in this case the executor had paid the legacies, and all that the court therefore were required to do was to sustain his claim for an allowance for the payment, which was done. See too the case of *Bartlett and others vs. Nye and others*, 4 Metcalf, 378, and *Going vs. Emery*, 16 Pick. 107.

In 7 Vermont Reports, 241, is an important case which was well considered by the Chancellor—the case of the *Executors of Burr vs. Smith and others*, and which grew out of a bequest to the American Bible Society and other unincorporated societies. The form of the bequest was to "the treasurer for the time being of the American Bible Society," &c. It was held that courts of chancery had jurisdiction of bequests to charitable uses, before the statute of 43 Elizabeth, by virtue of their equity jurisdiction, and that a gift to a charitable use might be decreed, notwithstanding the objects were vague and indefinite and the persons who were to carry into effect the intent of the testator, were a society unincorporated. The Chancellor sustains the bequest. He says that societies or bodies of men unincorporated have ever been considered, at common law, as capable

[Green et als. vs. Allen et als.]

of receiving gifts or legacies, to be applied to charitables uses. P. 278. He says there can be no objection in decreeing the money to be paid to the one who ordinarily receives and keeps the funds of the societies; and in this case it is decreed that the legacies shall be paid to the treasurers of the societies for the time being, who are to receive them for the use and benefit of the societies, to be disposed of by them for the objects contemplated in their associations, agreeable to the intent of the testator. P. 311.

In Kentucky, it was held in the case of *Moore's heirs vs. Moore's devisees and executors*, 4 Dana, 354, that a devise to the County Court of Harrison of a fund to educate poor orphans, is not illegal, nor void for uncertainty, when tested by the rules of the common law alone, but might be enforced independently of any English statute; that the case was not *prerogative* but judicial and equitable. It was likewise held that the statute of Elizabeth so far as relates to giving validity to gifts for charitable uses, was in force in Kentucky, though so far as the remedy was concerned, the appointment of commissioners, it was not applicable to their institutions, and therefore not in force there.

In North Carolina, 1 Hawke's Law and Eq. Reports, *Griffin vs. Graham*, 97, it was held that the statute of 43 Elizabeth was in force in that State; but that independent of that statute, the court of equity had jurisdiction. In this case, the object of the bequest was, the establishment of a school for the education and maintenance of poor children, and it was sustained.

I will now notice briefly, the decisions which have been made by the Supreme Court of the United States upon this question. The case of the *Trustees of the Philadelphia Baptist Association vs. Hart's executors*, 4 Wheat. 1, arose upon a bequest to "the Baptist Association, that for ordinary meets at Philadelphia annually," which was to be a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry. It was held that the association, not being incorporated, could not take the trust as a society; that it was likewise void for uncertainty as to the devisees, and could not be established by a court of equity exercising its ordinary

[Green et al. vs. Allen et al.]

jurisdiction independently of the statute of Elizabeth. This was a case which arose under the laws of Virginia where the statute of 43 Elizabeth, ch. 4, had been repealed. I consider however, that this case in effect has been overruled by later decisions of this high tribunal.

In *Beatty vs. Kurtz*, 2 Peters, 566, a lot of ground had been marked out by the proprietor, upon the original plan of the town, for the use of the Lutheran Church, a voluntary unincorporated society. This was sustained in favor of the society upon a bill filed by a committee in behalf of the society.

The case of *Inglis vs. The trustees of the Sailor's Snug Harbor* in the city of New York, 3 Peters, 99, was one where the testator gave his estate both real and personal to the Chancellor of the state of New York and the Recorder of the city of New York (and other persons by their official description) and their successors in office, to establish an asylum called "The Sailor's Snug Harbor," for the purpose of maintaining aged and decrepid sailors. He further directs that if his intention cannot be legally carried out without an act of the legislature, that they shall apply for an act of incorporation. The legislature of the state of New York afterwards incorporated them for the purpose of executing the trusts declared in the will. The court sustained this devise upon common law principles, and declared this was a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trusts declared in the will. The principle of this case, as I think, is directly in conflict with that in 4 Wheat. before referred to. It will be perceived that the object of the bequest, the maintaining aged and decrepid sailors, is quite as vague as the one in that case, and if the bequest to the Baptist Association was invalid in consequence of the incompetency of the trustee to take and manage the fund, the members of the Association continually changing, the same objection would exist against the persons mentioned here and their successors in office; and if the devise was actually void, which it would have been according to that case, and the property had been vested in the next of kin, it is clear that no subsequent act of incorporation would divest it.

In *Cincinnati vs. White's lessee*, 6 Peters, 431, the court ad-

[Green et al. vs. Allen et al.]

verting to the rule which prevails in private grants, that there must be a grantee as well as a grantor, say, "that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication."

In the case of *Vidal et al. vs. Girard's executors*, 2 Howard, 128, before referred to, one of the objections to the establishment of the will was, that the beneficiaries who were to receive the benefit of the charity were too uncertain and indefinite for the bequest to have any legal effect. These are declared in the will to be "poor white male orphans between the ages of 6 and 10 years," first of the city of Philadelphia; 2nd, those born in any other part of Pennsylvania; 3rd, of the city of New York, and lastly those of New Orleans. The court review the case in 4 Wheat. and the authorities on which it was founded, together with the later sources of information upon this question, and come to the conclusion that this is a valid charity independently of the statute of 43 Elizabeth.

Some of the authorities in opposition to this view of the question, have already been sufficiently noticed and commented upon. But we are likewise referred to the case of *Holland vs. Peck*, 2 Iredell, 255. In this case the bequest was more general than the present, it being for the benefit of the Methodist Episcopal Church in America, whereof Francis Asbury at the date of the will was the presiding Bishop; no specific object indicated to which the fund was to be applied, but it was to be disposed of by the Conference or the different members composing the same, as they shall judge most expedient for the spread of the gospel. With all my respect for the character and virtues of Judge Gaston, I do not regard this case as a high authority, for it was evidently not much considered, but little discussion upon principle, and not a single authority from the English law referred to except that of *Morrice vs. Bishop of Durham*, 9 Ves. 405, nor any of the American cases upon the subject of charities. The reasoning however of the Judge

[Green et al. vs. Allen et al.]

would be sufficient at least to support one of the bequests in this will, to the Tennessee Annual Conference; for he asks, "Is the money to be employed in building churches, in establishing schools, in paying ministers, in publishing books, or in supporting the poor? These, and many such as these, would appear to be means tending to promote the spread and increase of the gospel; and any of them, had they been definitely expressed, might be regarded as specific charitable objects, which the court could cause to be executed, although the trustees designated by the testator were unable to perform them." P. 259, 260. This case was decided upon the ground that the Methodist Episcopal Church not being incorporated, could not take or hold property, and that the precise manner in which the fund was to be applied, not being indicated, the bequest was rendered indefinite and void, which as I think has been abundantly shown heretofore to be an unsound view of the law.

Another authority relied upon is that of *Dashiell vs. Attorney General*, 5 Har. & John. 392, decided in Maryland in 1822, where it was held that the statute of 43 Elizabeth, ch. 4, was not in force. In this case, the fund was given to trustees to apply the income to the maintenance and education of the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church in the city of Baltimore. The bequest was held to be indefinite and void. The court follow the case in 4 Wheat. and say, that before the statute of Elizabeth no charity could have been established where the instrument creating it was defective, or the object of the testator's bounty so vaguely and imperfectly described as to be incapable of taking if it was not a charity. P. 400.

A similar decision was made in Virginia, in *Gallego's executors vs. The Attorney General*, 3 Leigh, 450, where it was held that the statute of Elizabeth had been repealed and that the Court of Chancery had no jurisdiction to decree charities where the objects were indefinite and uncertain. The court follow the opinion in 4 Wheat. that there was no common law jurisdiction over devises to charitable uses prior to the statute of Elizabeth.

It must be admitted, however, that there is an irresistible

[Green et al. vs. Allen et al.]

weight of authority in favor of the original and inherent jurisdiction of a court of chancery to sustain such charities as the one created by this will.

The conclusion then to which I have come upon this branch of the argument is, without any reference to the statute of Elizabeth, that this is a valid bequest, and that this court can, as a court of equity, by virtue of its common law powers immemorially exercised both in England and in the highest judicial tribunals in the United States, give it effect. This is not by virtue of any *prerogative* power, which is not claimed for this court. It is not upon the doctrine of *cy pres*, that if you cannot give effect to the intention of the testator and apply the fund to the charity he intended, the court will then apply it to some other charity as nearly analagous to it as possible, a doctrine which I wholly repudiate; but it is upon the simple *judicial* power of the court, and which it continually exercises. The executors are the trustees for the legatees entitled to the fund under the will. All that this court are required to do, is to declare the validity of the bequest, and to direct the executor to perform the trust, and to pay over to these societies, or their proper officer to receive it, that portion of the fund to which they are entitled, or to give a decree against him for the amount. There is no necessity for any *scheme* to be reported by the Master, in regard to the application of the fund, or the objects to which it is to be appropriated. These societies are fully competent to form a scheme for its administration. The testator was willing to intrust it to them, and so may this court be. We cannot suppose there will be a breach of trust on the part of these societies, in the management or application of the fund. If there is, when such a case occurs, it will be time enough then to investigate it, and to give relief as in other cases of breach of trust.

With the view here taken of the validity of this bequest and of the power of this court to give it effect upon common law principles, it is perhaps not indispensable to enquire further, whether the statute of 43 Elizabeth, ch. 4, in regard to charitable uses, is in force in this State. But as that question is directly made here, and in one point of view would relieve

[Green et al. vs. Allen et al.]

this case of any difficulty, if any existed, I will proceed to examine that question with as much brevity as possible. This statute of Elizabeth was enacted in 1601. The date of the Virginia charter, which included what was afterwards called North Carolina, and since Tennessee, was 1606, and the first settlement in Virginia under Smith at Jamestown was in 1607; and it is a settled doctrine, that English statutes, passed before the emigration of our ancestors, which were applicable to our situation and government, constitute a part of the common law of this country, and that that common law is the law of the land in all the States of the Union. 5 Peters, 233; 8 Pick. Rep. 309; 7 Peters' App. 976-7; 4 Paige, 198; 1 Kent, 472-3. See too 4 Dana, 361; 1 Tenn. 154; Haywood's Hist. of Tenn. p. 2; 2 Peere Wms. 75.

In addition to that, by express legislative enactment in North Carolina in 1778, chap. 5, (Nicholson & Caruthers, 438,) which is in force here, all such statutes and parts of the common law as are not inconsistent with the freedom and independence of the State and our form of government, and which have not been otherwise provided for, nor abrogated or repealed, or become obsolete, are declared to be in full force within the State. These statutes are those which were passed previously to the date of the charter before referred to. 1 Tenn. 154.

Let us look then at this statute of Elizabeth and examine its provisions so far as this case is concerned. It recites in substance, that lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, had been before given, limited, appointed and assigned, by well disposed persons; "some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways; some for education and preferment of orphans," &c.; and that the same "had not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same."

[Green et al. vs. Allen et al.]

It is then enacted that the Lord Chancellor, &c. shall appoint commissioners to enquire into all such gifts, limitations assignments and appointments, and of the abuses, breaches of trust, negligences, misemployments, &c. of such lands, goods, chattels, &c. which had before been given, limited, appointed or assigned, or which thereafter should be given, limited, appointed or assigned to or for any of the charitable or Godly uses before mentioned; and to make such orders, &c. in reference to the same, which shall cause them to be faithfully employed to the charitable uses before mentioned; and which orders and decrees were to be returned into the Court of Chancery, and to stand good until the same shall be undone or altered by the Lord Chancellor, &c. who upon complaint of the party aggrieved, might "annul, diminish, alter or enlarge the said orders, judgments and decrees of the commissioners" as was consistent "with equity and good conscience, according to the true intent and meaning of the donors and founders thereof." English statutes at large, 2 vol. 708.

Now, so far as regards the main object of the act, which was the protection of the charities there mentioned, it cannot but be regarded as equally important in the Colonies, with the Mother Country, so far as they had charities which required protection—and so likewise in the State of North Carolina, after she became a State. The statute upon its face does not purport to give any new jurisdiction over charities to the Court of Chancery, which it did not before possess; but on the contrary recognizes the existing power of the court, and gives an additional remedy by the appointment of commissioners. Now, whether the Colony of North Carolina had all the officers mentioned in the act, or whether the peculiar remedy pointed out was ever followed or not, there, is wholly immaterial. The act recognizes the validity of such charities, and the jurisdiction over them of a Court of Chancery, and consequently the Court of Chancery when established in the Colony, and afterwards in the State of North Carolina, would have the right to protect such charities in any way consistent with the acknowledged powers of a Court of Chancery. It is known too as matter of history, that the Colony of North Carolina had a Court of

[Green et al. vs. Allen et al.]

Chancery, which was established by the Lords Proprietors under the charter, which was held by the Governor and council. See 1 Hawke's Law and Equity, 132. And in 1782, a Court of Equity was established by the State of North Carolina, with "all the power and authority that the Court of Chancery, which was formerly held in the State under the late government, used and exercised, and that are properly and rightfully incident to such a court, agreeable to the laws in force in the State, and not inconsistent with the constitution." 1 Scott, 261. In 1794 the old Superior Court in this State was constituted with similar powers, which were continued to the Circuit Court by the act of 1809, and afterwards to the Chancery Court.

I take it, then, that this Statute of Elizabeth, must be regarded in force here, so far as any question growing out of it is involved in this cause, that is, to the extent of giving protection to charities, for in that regard it is eminently liberal, and in accordance with the spirit of our free institutions.

To proceed, then, with the statute. So far as regards the uses in the will, it is not denied that they are charitable within the statute. See 2 Story, 511-12. It only remains then, to enquire whether the bequests are valid and protected by the statute. It is said, if the statute is in force here, that we ought to look rather at the plain meaning of the act, than to the extravagant constructions which have been placed upon it by the English courts, and the Judges of some of our own States. It is true that these decisions are not binding upon this court, but at the same time I know of no reason why we should disregard the opinions of the master minds of English and American jurisprudence upon the construction of an English statute, which is in force here, to the extent indicated, when it is upon a subject upon which we have not legislated, and when upon other subjects we give their opinions the most respectful consideration.

But let us look at the act itself, not forgetting, however, the favor with which charities have always been regarded, and that the construction, therefore, upon a statute in reference to them should be a liberal one. Now, the objection here is, as before

[Green et aln. vs. Allen et aln.]

remarked, that these Societies are unincorporated, and the objects of the bequest indefinite and vague. Is there any thing in the language of the act which shows that it is charities to incorporated societies, or even charities where there were competent trustees; that are alone to be protected? Certainly not. The language is very broad and general, covering all the charities mentioned in the act, no matter how created, and having no more reference to a corporate than to an unincorporated society. It speaks of property which had been before given, limited, appointed or assigned, or which shall be hereafter given, limited, appointed or assigned to or for any of the charitable and godly uses before mentioned. Besides, a bare reference to the charities enumerated in the act, will show that it could not be, and never was intended to be confined to incorporated associations. As for instance, charities for the relief of aged, impotent and poor people, for maintaining sick and maimed soldiers and mariners, for the education and preferment of orphans, for free schools, for the repair of bridges, churches, &c.; most of which exclude the idea of an incorporated association for their benefit.

With regard to the other objection to the vagueness and indefiniteness of the bequest, that the beneficiaries are not designated, nor the precise manner of the application of the fund indicated,—is this necessary under the statute? Is the charity required to be defined with technical accuracy in order to make it valid? That is not required, either by the language or the spirit of the act. From the nature of things, from the kind of charities to be protected, they must be to some extent vague and indefinite. Suppose the charity was for the education and preferment of orphans, how could they be designated in the will? It is for a free school, or school of learning—why require any thing more? The statute does not. And would not the attempt at specification under the circumstances in which wills are usually made, defeat the very object they were intended to advance? Is it to a missionary society, the object of whose labors, is the spread of the Gospel by means of missionary schools and missions, printing books for the benefit of those schools, &c., which is within the acknowledged equity of the

[Green et al. vs. Allen et al.]

statute? Why require any further specification, and which it would be impracticable to make? The effect of the argument would be to destroy all charities, unless drawn with technical precision and accuracy, which is rarely to be expected in a last will and testament. It seems to me this objection cannot now be successfully urged. If these Societies are competent to take and administer this charity, and if the uses are charitable within the statute, this court can enquire no further, unless upon some case of misapplication of that charity, upon which it might be called upon to interfere, which is not the case here. I take it, then, if this court were now, for the first time, to adjudicate upon this statute, that these bequests would be regarded as valid, and be sustained by the court.

But it is time to refer to some of the decisions under this statute. In the case before referred to of *The Philadelphia Baptist Association vs. Hart's Ex'rs*, 4 Wheat. 1, the Chief Justice admits, p. 29, that that is a legacy which would be sustained in England under the statute of Elizabeth. It is very certain, that gifts to unincorporated societies were good and protected by the act. In the case of *Waller vs. Childs*, Ambler, 524, the fund was for the benefit of poor dissenting ministers, to be paid to the Treasurer of the Societies. A bill was filed by the heir at law, to set aside the charitable bequests. It was held, that the bequests were good. The case of *Baylis and Church vs. The Attorney General*, 2 Atk. 239, is the case of a bequest to the Aldermen and inhabitants of a ward, who were not a corporation. Lord Chancellor Hardwicke decreed, that the money might, from time to time, be disposed of in such charities as the Aldermen, for the time being, and the principal inhabitants should think most beneficial to the ward. Story recognizes it as a settled principle, that a bequest to an unincorporated society is good. 2 Story's Eq. Juris. 515.

In *Attorney General vs. Clark*, Ambler, 422, George Crans-
town, by will, gave the interest of £4,200 bank annuities to the poor inhabitants of St. Leonard, Shoreditch. A bill was filed to establish the charity. It was insisted that the bequest was void for uncertainty, but it was sustained by Sir Thomas Clarke, Master of the Rolls. In *White vs. White*, 7 Ves. 423,

[Green et al. vs. Allen et al.]

thetestatatrix, by her will, bequeathed a personal fund of £3,000 for the purpose of putting out "poor relations" apprentices, and afterwards, by a codicil, she confined it to two families. Upon a bill filed to carry into execution the trusts of the will, it was sustained by Sir William Grant, Master of the Rolls, as a valid charity. In *Powell vs. The Attorney General*, 3 Merivale, 48, a bequest "to the widows and children of seamen belonging to the town of Liverpool," was held to be a valid charitable bequest.

In *Attorney General vs. Hickman*, 2 Eq. Cas. Abr. 193, the testator, by a codicil to his will, devised the residue of his estate and effects to be given to such non-conforming ministers as preached God's word in places where the people are not able to allow them sufficient maintenance, and appointed two persons to have the disposal and appointment of the charity, who died in the life time of the testator. One question was, whether the trustees having died in the life time of the testator, the charity was not gone, and in the nature of a lapsed legacy. It was decided by the Chancellor, Lord King, that the substance of the charity remained, notwithstanding the death of the trustees before the testator, and though at law it was a lapsed legacy, yet in equity it subsisted and was good within the statute of Elizabeth.

It is likewise a principle, that the court will in aid of charities supply all defects of conveyances, when the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. 2 Story, 518.

In *Attorney General vs. Comber*, 2 Sim. & Stu. 93, a bequest to the widows and orphans of the Parish of Lindfield, was held to be a good charitable bequest. *The Attorney General vs. Stepney*, 10 Ves. 22, was a bequest for the use of the Welsh Charity School, and the increase and improvement of christian knowledge and promoting religion, and to purchase Bibles and other religious books, pamphlets and tracts as the trustees should think fit, which was sustained. See too *Moggridge vs. Thackwell*, 7 Ves. 36; *Mills vs. Farmer*, 1 Merivale, 55, and *Attorney General vs. Bishop of Chester*, 1 Br. Ch. Cas. 444.

[Green et al. vs. Allen et al.]

Cases might be multiplied indefinitely from the English courts to show, that charities, much more vague and indefinite than the present, would be sustained in England, under the ordinary, acknowledged, judicial powers of a court of equity.

The cases to which we have been referred, that of *Morrice vs. Bishop of Durham*, 9 Ves. 399: *Vesey vs. Jamson*, 1 Sim. & Stu. 69: and *Williams vs. Kershaw*, cited 1 Keen R. 232: 2 Story, 505, which have not been sustained by a Court of Chancery, are not analogous to the present. They were for objects of general benevolence and liberality, and not within the class of cases enumerated in the Statute of Elizabeth, nor within its spirit and meaning, and too indefinite to be executed.

But it is insisted, that although this charity might be enforced in England, yet it would not be upon the ordinary jurisdiction of a Court of Equity, but upon the personal and prerogative powers of the Chancellor, as the delegate and representative of the Crown, and which powers do not belong to the Chancery Court here. By statute, as before shown, our court of chancery has all the powers which properly and rightfully belong to such a court, and which are not inconsistent with our constitution and laws. And its powers are no doubt as ample as that of the chancery court in England, with no other difference except that which grows out of the difference of our institutions. We have assumed jurisdiction to the fullest extent in all other cases of trust, to protect them and to secure their due execution, and when there has been a refusal or failure on the part of the trustee to execute the trust, this court has executed it. 3 Hump. 251, 442. See too 2 Hump. 367: 3 Yerg. 257: 9 Do. 171. Why shall we stop short in reference to charities, which appeal so strongly to the support of the judiciary? A charity is nothing but a trust, but, as before remarked, the most highly favored of all trusts, being generally for purposes of education or religion. There are no doubt many cases to be found in the English courts, where the Chancellor is regarded as the special delegate of the Crown, administering its peculiar duties and prerogatives. As for instance, where money is given to charity generally and indefinitely, without any particular object designated, or any one appointed to administer it.

[Green et als. vs. Allen et als.]

There the disposition and administration of it are in the King by his sign manual, acting through the Chancellor. See 2 Story, 536: 3 Peters, 499: 7 Vermont, 305. And so when the proceeding is by commission under the Statute of Elizabeth, as in the case of *The Corporation of Burford vs. Lenthall*, 2 Atk. 551, the authority which the Lord Chancellor exercises, is said to be personal, and not to arise by virtue either of his ordinary or extraordinary jurisdiction in chancery. But that does not affect the argument here, if it has been shown that this is a good and available trust, and a charity that would be protected, either according to the principles of the common law, or under the Statute of Elizabeth. It is then as properly the subject for a court of chancery, and for the exercise of judicial power as any other trust. And such has been the universal opinion both in England and in the United States. See 3 Peters, 499: 4 Dana, 368.

In whatever aspect, therefore, I have been enabled to examine this question, I regard the bequests contained in the will as valid, and that they should be sustained by this court.

As it regards the division of the fund between the Tennessee Annual Conference of the Methodist Episcopal Church, and the Missionary Society of the Methodist Episcopal Church, equality in such a case would be equity, and there must be an equal division of the fund between them. *Attorney General vs. Dooley*, 7 Ves. 58, note: 10 Do. 538: 6 Paige, 653.

In my opinion, the decree of the Chancellor should be reversed, the demurrer overruled, and the cause remanded for further proceedings.

THE GOVERNOR *et als.* vs. McEWEN and sureties.

1. A bill was filed in the name of the Governor of the State and the Commissioners of Common Schools against the Superintendent of Public Instruction, and against two sets of sureties, for different periods, for an account of the sums of money received by such functionary during his administration of the common school fund. It is held,

1st. That a Court of Chancery was the more appropriate forum for the settlement of the various and complicated transactions involved, and adjusting the respective liabilities of the two sets of sureties. And 2d. That the bill was not multifarious.

2. The Superintendent of Public Instruction and his subordinate Agents are bound to collect the moneys due the Common School Commissioners, in such funds, and such only, as are receivable by the State through its agents in discharge of taxes.

3. Where funds current at the time and place of the reception of them, became in a reasonable time thereafter uncurrent, by unforeseen events, in the hands of the Superintendent or subordinate Agents, the loss to the extent of its diminished value shall not fall on them, if it appear, that at the time and under the circumstances, the reception of the funds was prudent and proper, and for the probable benefit of the State.

4. A public collector shall be held responsible if he fails by negligence to collect sums of money which, by the use of reasonable diligence, he might have collected.

5. When a public functionary uses public moneys for his own private purposes, he is chargeable with compound interest.

6. The Legislature of the State, in the absence of constitutional prohibition, has the supreme and unrestricted control over the property and money of the State, and when they, or either of them, are in the hands of a citizen, it has the power to dismiss or compromise suits instituted for the recovery thereof according to its own sense of the interest of the State and right to the citizen, and this power may be delegated.

7. A resolution of the legislature, appointing commissioners to settle and compromise a suit against the sureties of the Superintendent of Public Instruction, "upon principles of right and justice towards the sureties, and to the best interest of the school fund," and directing that the report of said commissioners should be made the judgment of the court in which the suit was depending, is not in violation of the 10th section of the 11th article of the Constitution of the State.

8. The board of commissioners of school funds have the power to make all contracts in reference to the school fund, not prohibited by law, and may compromise a doubtful claim for the better security of the fund, yet it being a public corporation, subject to legislative modification or total repeal, the vesting it with such power, does not deprive the legislature of a similar power, when it may choose to exert it by act or resolution.

The 10th section of the 11th article of the constitution, provides, that the fund "called the school fund, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation, and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State; and no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools; and it shall be the duty of the General Assembly

[The Governor et als. vs. McEwen et als.]

to appoint a board of commissioners for such term of time as they may think proper, who shall have the general superintendence of said fund, and who shall make a report of the condition of the same from time to time, under such rules, regulations and restrictions as may be required by law."

In 1836, the legislature in execution of this provision of the constitution, passed an act entitled, "an act to appoint a Board of Commissioners of Common Schools, and to secure the common school fund."

This act created, the Treasurer of the State, the Comptroller of the Treasury and an Executive officer, to be called the Superintendent of Public Instruction, "a body politic and corporate, by the name and style of the Board of Commissioners of Common Schools," which "may hold and possess property of any kind in trust for the use of common schools," &c. &c. "and may do and execute all acts which a corporation or body politic, in law, can lawfully do and execute."

This act constituted the Superintendent the President of the Board of Common Schools, and directed all notes, bonds, &c. executed by the board to be signed by him.

The second section provides, that the Superintendent shall be elected for two years, and shall give bond with sureties for the faithful discharge of his duties in the sum of \$100,000, payable to the Governor.

The 4th section directs him to make settlements with all the officers previously intrusted with the administration of this fund, and directs all those having the property, notes, obligations, &c. &c., of the school fund, to deliver them to the Superintendent, and directs the said Superintendent to collect the funds and proceed in the administration of the same as directed by law.

The 11th section is as follows:

"As fast as the curtailments and interest shall be paid, or any of the school funds shall be otherwise collected, it shall be paid by the person collecting, or having possession of the same, into the hands of the Superintendent of Public Instruction, who shall invest the same by subscribing for stock of the Planters' Bank of Tennessee, in the name of the Board of Common

[The Governor et al. vs. McEwen et al.]

School Commissioners; and who shall in like manner re-invest the profits as they accrue on the capital stock, or deposit the same upon the best terms, and for the highest rate of interest he may be able to obtain, or he may deem most advisable."

Under this state of legislation R. H. McEwen was elected Superintendent for two years, in accordance with law, with O. B. Hays and others as his sureties in a bond, conditioned as follows:

"The condition of the above obligation is such, that whereas, by an act of the General Assembly of the State of Tennessee, passed on the 19th day of February, 1836, entitled "An Act to appoint a Board of Common School Commissioners, and to secure the Common School fund, the office of Superintendent of Public Instruction is created and his duties are therein and thereby defined: And whereas, Robert H. McEwen has been appointed to that office by a joint vote of both branches of the General Assembly for the term of two years, and until his successor shall be elected and qualified agreeably to the provisions of said act. Now, if the said Robert H. McEwen shall truly and faithfully discharge the duties of said office of Superintendent of Public Instruction as required by said act, during his continuance therein, then the above obligation to be void, otherwise to remain in full force and virtue."

At the expiration of two years he was again elected for two years, and again gave bond with sureties, conditioned as the law directs, as follows:

"The condition of the above obligation is such, that whereas, by an act of the General Assembly of the State of Tennessee, passed on the 19th day of February, 1836, the office of Superintendent of Public Instruction was created, and whereas, the said R. H. McEwen was elected to that office for the term of two years from the 20th February instant, and until his successor is elected and qualified, by joint vote of both Houses of the General Assembly of 1837-8. Now, if the said R. H. McEwen shall truly and faithfully discharge the duties of his office as required by said act, during his continuance therein, then the above obligation to be void, otherwise to remain in full force and virtue."

[The Governor et al. vs. McEwen et al.]

In 1839 the legislature directed a bill to be filed against the Superintendent for an account.

This bill was thereupon filed in the Chancery Court at Franklin, which so far as is necessary to be set out, is as follows:

"Humbly complaining, show to your honor, your orators, James K. Polk, Governor of the State of Tennessee and successor in office to Newton Cannon, late Governor of said State, and the Board of Commissioners of Common Schools for the State of Tennessee, who sue in behalf and for the use of Common Schools and Academies for the State of Tennessee, and for all other persons and corporations interested in the subject of the suit, who may come in and contribute to the costs, &c., that some time about the 24th of February, 1836, one Robert H. McEwen, a citizen of Davidson county, was by joint vote of both Houses of the General Assembly of the State of Tennessee, elected Superintendent of Public Instruction for said State, and *ex officio* President of the Board of Commissioners of Common Schools for the term of two years, and until a successor should be elected to said office and qualified.

"Your orators would represent that said McEwen, on the 24th of February, 1836, entered into bond, with Oliver B. Hays, John Scott, Robert C. K. Martin and John Trimble, of Davidson county, and William Edmiston and Samuel E. Gilleland, of Lincoln county, his sureties, payable to Newton Cannon, then Governor of said State and his successors in office, with a penalty of \$100,000, conditioned for the faithful discharge of the duties of his office.

"After the execution of said bond, which was received and approved of by the Governor, the said McEwen qualified and entered upon the discharge of the duties of his office. At the time said Superintendent entered upon the duties of his office, there was a very large amount of money belonging to and accruing to the Common School fund by the constitution and laws of the State, viz, from the dividends and bonds and bonuses of the Planters' and Union Banks, the Life and Trust Insurance Company, Marine and Fire Insurance Company; from Mason Lee's estate, debts due the old Bank of Tennessee

[The Governor et al. vs. McKwen et al.]

at Nashville and at Knoxville; from Joel Parish's sureties; from the county common school commissioners and county bank agents, bonds, notes, stocks, and other effects in the hands of county school commissioners and agents appointed to close the concerns of the bank of the State, moneys due for taxes on tippling houses, and from many other sources and persons, as well as a large amount of other stocks, debts, and effects, all of which it was made the duty of the Superintendent to receive and collect without delay.

"By the 11th section of the act of 1835, ch. 23, it is made the duty of the Superintendent, as fast as any of the school funds should be received by him, to invest the same by subscribing for stock of the Planters' Bank of Tennessee in the name of the Board of Common School Commissioners, and in like manner to re-invest the profits as they arise on the capital stock, or to deposite the same upon the best terms and for the highest rate of interest he could obtain.

"Your orators would represent, that shortly after said Superintendent entered upon his trust, he received very large sums of money from the various sources above stated and others; but in violation of his trust and duty, failed either to vest the same as he received it in Planters' Bank stock, or to deposite it at the highest rate of interest which he could have obtained. But on the contrary thereof, though he made some investment in stock, as they have been informed and believe, he constantly kept large balances in his hands after paying the expenses incident to his office.

"The sum retained by the Superintendent, was never attempted to be deposited by the Superintendent at the highest rate of interest he could obtain from the Bank, or at any rate of interest, as they are informed; but the same was kept in his own hands, used in trade, loaned out at usurious interest at times and at other times at legal interest to his friends, acquaintances and comexions.

"Your orators would represent that these balances retained in the hands of the Superintendent began gradually to increase some few months after the date of his bond, and continued to increase gradually or nearly so until the expiration of two years

[The Governor et als. vs. McEwen et als.]

from his qualification, when the balance withheld from investment and deposit as before stated, amounted to one hundred and forty or fifty thousand dollars or more, as they are informed and believe.

"By this unjustifiable breach of trust on the part of the Superintendent, the Common School fund has sustained much loss.

"In the first place, had the Superintendent invested the funds in his hands, as he received them, in Planters' Bank stock, and then re-invested the dividends in that stock, the fund would have made compound interest.

"Or if he had deposited the money in Bank at the highest rate of interest, they are informed and believe he could have obtained six per cent, payable semi-annually, and by depositing this interest on the same terms he could have made for the fund compound interest or more, and thus handsomely increased the fund.

"The Superintendent had his residence and the funds in Nashville where the Bank was located and doing business, and no obstacle existed to immediate investment or deposit so as to make the funds produce interest immediately after it came to his hands from time to time.

"Your orators have been informed and believe that the said Robert H. McEwen, from time to time, within the period of the first two years, of his acting as Superintendent, loaned out to divers persons a large portion of said funds in his hands to different persons or friends, and took from them their bonds, notes, bills of exchange, or other securities, with endorsers or securities for the same. But the amount loaned, the times when loaned, to whom loaned, the securities or evidences thereof taken, when due or payable, they are not informed, as the same are in the hands and possession of said McEwen.

"By thus loaning out the school funds, the said McEwen has endangered their ultimate collection, and has placed the same beyond the control of the present Superintendent and the Board of Commissioners of Common Schools, whose duty it is by law to apportion them among the different counties of the State and have them collected and paid into the State Bank,

[The Governor et al. vs. McEwen et al.]

to be paid out upon the warrant of the Comptroller, that the benevolent objects of the State may be carried into effect.

"This conduct of the Superintendent, R. H. McEwen, has further lessened the security of said fund by abstracting so large a sum from it beyond the penalty of his bond, and thereby defeating your orator's redress in a court of law against his securities for the excess, and thereby placing and resting the same upon his own responsibility, or compelling your orators to come into your honorable court and have said securities placed under the control of your honor, and placed in the hands of a receiver, that they may be collected without delay, and with as little loss as possible, and paid into the Bank of the State for the use of common schools.

"Your orators have been informed and believe, that the defendant, R. H. McEwen, has, during the term of his continuance in office as well in the first two as in the second term of two years, loaned out other portions of said school fund to the same and other persons, and has received for the same more than six per cent. per annum for the times said moneys were loaned. The amount of said interest so received, or times when, or the persons from whom received, they are not informed of, and have no means of knowing, except by the discovery of the defendant.

"They are informed and believe the said McEwen did not keep any regular account of said loans and receipts of interest, or if he did, he has wholly failed and refused to furnish the same to the present Superintendent, the Board of Commissioners for Common Schools, or Joint Select Committee of the Senate and House of Representatives of the State, who were appointed to investigate his accounts with him, and who called upon him for said account, as they are informed and believe.

"Your orators are also informed and believe that the said R. H. McEwen, in continuing the loans upon the notes, bills, drafts and securities before mentioned; and in renewing the same from time to time, has received by way of interest or discount more than six per. cent per annum on many of said loans, but the amount thereof, or on which or when, they have no means of knowing but by the discovery said McEwen.

[The Governor et als. vs. McEwen et als.]

"They are also informed that in certain instances, but in how many they are not informed, the said McEwen has loaned out said fund to his friends without requiring them to account for or pay any interest, when said funds could have at any time been placed on interest, if said McEwen had properly discharged his trust.

"Your orators have no means of ascertaining the amount or dates of these latter loans, or the times they were kept up, but by the discovery of said McEwen.

"Your orators have likewise been informed that the said McEwen has from time to time, used said funds, or a part thereof, in trade or speculations, either in his own name, or in the name of McEwen, Whiteman & Co., John Scott, William B. Robinson & Co., or in some other name or names; but what amount was so used or invested they are not informed, and have no means of knowing but by the discovery of said McEwen, nor do they know what time said moneys were used in trade or speculations; nor the form in which they were so invested, whether in the shape of loans or otherwise, all which they require the defendant to make a full disclosure of, with an exact and full account, containing persons, dates and amounts, with the character of the business and description and locality of any property real or personal, purchased with any portion of said funds in this State or elsewhere.

"Your orators would further represent, that in the month of February, 1838, the said Robert H. McEwen was again elected Superintendent of Public Instruction for the next ensuing two years, ending the 19th of February, 1840, and on the 19th of February, 1838, qualified and entered into bond and security in the penalty of one hundred thousand dollars, payable to Newton Cannon, then Governor of the State of Tennessee and his successors in office, with the said Oliver B. Hayes, John Scott, Samuel E. Gilleland, and John Trimble, and John Lannier, of Lincoln county, and E. McEwen and Samuel Roseborough, of said county, his securities, conditioned for the faithful performance of the duties of his office for said term of two years, which said bond is here exhibited by a copy thereof filed, marked B, and prayed to be taken as a part of this bill,

[The Governor et al. vs. McEwen et al.]

which said bond was also received and approved of by the then Governor.

"The said McEwen then entered upon the duties of the second official term; and although it was his duty to have immediately proceeded and collected all the moneys he had before that time loaned out, and called in all of said moneys he had vested in trade or property, and vested the same in Planters' Bank stock, or deposited them in bank at the best interest he could obtain, he wholly failed and refused so to do, but continued to indulge said debtors, and to keep said moneys in trade or on loan; and during the said last term likewise loaned out other moneys, and appropriated them to his own use, in violation of his duty as Superintendent.

"For these last loans, as well as the former, they are informed the said Robert H. McEwen received more than legal interest in many cases, and in others he may have loaned to his friends without interest; but to what amount he loaned, to whom and for what times and what amounts of interest he received, or the rate of interest *per annum*, they are not informed, and can only rely on the discovery of said defendant; but they have been informed, and believe, that in many instances he received as much as, or more, than nine *per cent. per annum*.

"Your orators are informed, and believe, that the said R. H. McEwen continued pretty much the same course of dealing with the moneys in his hands during the last two years that he did in the first two, though they believe the amount by him paid out in his current expenses, and by him paid into bank as required by law, was greater, compared with the moneys on hand, than in the two previous years, though of this they have no certain means of information, as the said McEwen did not keep any regular account of all his receipts and disbursements, which were many and varied, forming a long and complicated account as well for as against himself.

"Nor are your orators enabled, from the reasons aforesaid, to know or state what remains in the hands of said McEwen, nor the amount of his receipts above, which difficulty was in part produced by the failure to give duplicate receipts for all moneys by him received, that a duplicate thereof might, by the agent,

[The Governor et al. vs. McEwen et al.]

school commissioner, bank, or other person making the payment, be transmitted and filed with the Comptroller of the Treasury.

"But from the best lights your orators have been able to obtain, the said McEwen received, as Superintendent, for the first two years of his term, between three and five hundred thousand dollars.

"Of this sum he invested in Planters' Bank stock, at various times and in various amounts, about two hundred and thirty-one thousand seven hundred dollars, for all which he has, as he alledges, the certificates of stock, but which he has failed to hand over to the present Superintendent, R. P. Currin, but retains them in his possession, with his books and accounts, which he refuses to surrender up to him, although he has been applied to for that purpose, as they are informed and believe.

"The said R. H. McEwen has also made various payments to county agents for their salaries, and other expenses attending the collection of the funds, and his duties as Superintendent, from five to ten thousand dollars, but the amount thereof is not known to your orators.

"During the second term of two years, the said McEwen, as they are informed and believe, received and collected from sources other than the proceeds of the sales of the Ocoee lands, between one hundred and two hundred and fifty thousand dollars, not taking into account about fifty thousand dollars of bank stock received from the county commissioners of common schools during the four years.

"They are also informed and believe, the said McEwen received from the sales of the Ocoee lands about three hundred and sixty or seventy thousand dollars, or more, at various times and in various amounts, and during said term he paid in at different times to the Bank of Tennessee, as capital stock, about four hundred and seventy-two thousand five hundred and fifteen dollars, and as sinking fund, about thirty-five thousand two hundred and twenty-nine dollars, for which he holds the evidences.

"Seid R. H. McEwen has also, during said two years, paid out various small sums of money to county agents and others,

[The Governor et als. vs. McEwen et als.]

as necessary expenses attending his duties as Superintendent, the amount of which they are not informed.

"The above statement of receipts and disbursements are not made upon the knowledge of your orators, and may be inaccurate in many particulars, and they reserve to themselves the right to correct the same whenever they shall find any errors.

"Your orators would further represent to your honor, that as they have been informed and believe, and so charge the fact to be, the said McEwen has been guilty of great neglect during the whole time of his service as Superintendent, in failing to collect large sums of money due the school fund by good and solvent men, which could have been collected by reasonable diligence.

"Among others, the debts due the old State Bank at Nashville, and from Joel Parrish's securities, and he ought in equity to be charged with all the funds due which he has so failed to collect, and which he could have collected by reasonable diligence.

"They are also informed, that he has collected several thousand dollars of the Academy fund, which he has failed to account for, and pay over according to law.

"Your orators would further represent, that as they are informed and believe, the said McEwen has in his possession and control, all the books and original papers pertaining to his office, without which the present Superintendent is much embarrassed in the discharge of the duties of his office, and the withholding of which is very injurious to the school fund and its officers; and said McEwen, though applied to for that purpose, refuses to deliver them to the present Superintendent.

"Your orators are advised, that from the uncertainty of the amount that may turn out to be due from R. H. McEwen, over and above the sum by him admitted to be due from him, in his report to the last General Assembly of the State, when he stated it at \$107,101 08, they deem they have a just right in equity to have the notes and claims due the fund in the hands of said McEwen, brought into court and placed in the hands of a receiver, collected and paid over to your orators or in bank, and hold McEwen and his securities responsible for all such

[The Governor et als. vs. McEwen et als.]

sums as cannot be collected by the receivers, and for all balances unaccounted for.

"Your orators are advised, they have a right to consider said claims as belonging to the school fund, though improperly placed in that situation by R. H. McEwen, not as a satisfaction or discharge of the securities from any part of their liability on their bonds, but as school moneys thus vested, and they have a clear right to hold said McEwen and his securities responsible for all eventual losses, as well in the collection of said funds as in his other breaches of trust.

And may it please your honor, on a final hearing hereof, to decree that an account be taken of all said trust moneys by said Rob't H. McEwen, received as Superintendent aforesaid, during his continuance in office.

And in taking said account, he and his said securities be charged with all sums of money by him received, and all moneys which he could have recovered by reasonable diligence, and which he has failed to invest and pay over according to law; with compound interest, with annual or semi-annual rests, as to your honor shall seem equitable.

That your honor will decree that said defendants shall pay the balances found in the hands of said Rob't H. McEwen into the Bank of the State for the use of common schools and academies, or to your orators for the purpose of being paid over.

"And may it please your honor to declare the rights of parties; and decree that said McEwen deliver up all stocks and effects and evidences of debts in his hands belonging to the common school fund, together with all certificates of stock, and that he deliver up to the President of the Board of Commissioners of Common Schools, the present Superintendent of Public Instruction, or to your orators, all the books of original entries and others pertaining to the office of Superintendent, together with all other matters and things in his hands, or under his control, belonging to the common school fund, or connected with the office of Superintendent."

To this bill there was a demurrer by the defendant McEwen and a portion of the sureties, on the ground that the obligee in

[The Governor et als. vs. McEwen et als.]

the bonds had a plain and unembarrassed remedy by a suit at law on the bonds; and, second, that the bill was multifarious.

This demurrer was overruled and the defendants ordered to answer.

McEwen answered as follows.

"It being made respondent's duty to redeem the circulation of the Bank of the State of Tennessee, he retained in his hands, at all times, a sum which he regarded to be adequate to that purpose, the amount of said circulation being, according to the books of said bank, the sum of \$13,973 70 cents. Respondent made no deposits of the surplus funds in his hands in the Planters' or any other Bank, because neither that institution nor any other bank in the State, so far as respondent has been informed, would receive deposits bearing interest at all, much less if the deposits were subject to be withdrawn at the will of the depositor. This being the case, respondent therefore thought himself at liberty, according to the letter, or at least the spirit of the act of 1835, c. 23, s. 11, to loan to individuals, as often as it could be done with safety, any of the surplus profits of the stock belonging to the school fund, or any of the uninvested capital of the school fund which remained at any time on hand. He pursued this course from the first; making generally on the first of every month investments of some portion of the fund in Planters' Bank stock. The collection of the fund being embarrassed with many difficulties, went on tardily; on which account, respondent addressed a circular to the county agents, dated September 5, 1836, a copy of which is herewith filed, and to be taken as part of this answer, marked Exhibit No. 2. This not being understood, or misunderstood by some, respondent addressed a third letter of instructions to them on the 24th of December, 1836, a copy of which is also herewith filed, and to be taken as part of this answer, marked Exhibit No. 3. From these circulars the court will see what measures respondent adopted, to advance the collection of the fund, and in general to discharge the duties of his office. On the 17th of October, 1836, respondent reported to the General Assembly, in obedience to a resolution, the amount due to the

[The Governor et alis. vs. McEwen et alis.]

commissioners of common schools from the several counties; the amount received from the several counties by him; the amount of bank and turnpike stock, and their productiveness; also the amount received by him from the Bank of Tennessee, and from individuals, &c. &c.: to which report, printed in the senate's journal of the called session of the legislature, pages 41, 42, respondent begs leave to refer the court, as part of this his answer. From this report it will be seen, that respondent had then collected, from the counties, in money, \$38,425 45 cents; from the Bank of the State of Tennessee and from individuals, \$105,264 49 cents; together, \$143,790 74 cents; and had invested in Planters' Bank stock, \$141,700 00 cents. On the 2d of October, 1837, respondent, at the stated session of the legislature, made his regular biennial report to that body, which will be found printed in the senate's journal, from page 501 to page 506, inclusive; to which he begs to refer the court, as part of this his answer. This report shows, that his receipts had been to that time, from all sources, \$300,346 15 cents; and his expenditures, on all accounts, \$239,678 78. On the 21st of November, 1837, he again reported to the General Assembly, in obedience to a resolution of that body, when he stated his receipts, down to that day, at \$326,720 16 cents; and his disbursements at \$239,968 88 cents, of which \$231,700 00 cents had been invested in Planters' Bank stock; and, deducting disbursements from receipts, leaving a balance in respondent's hands of \$86,751 28 cents, errors excepted. The general suspension of specie payments by the banks in the United States had occurred in May, 1837, to which, and its operation on the collection of the school fund, respondent called the attention of the legislature in the following terms: 'It may here be further remarked, that a considerable amount of the money received by him, since the general suspension of specie payments by the banks, consisted in notes of the Mississippi and Alabama banks, and other uncurrent bank paper, which had been taken by the agents previous to, or about the time of the suspension, or since, in the payment of doubtful debts. These notes have been at a discount of from 2 to 25 *per cent.* and in their disposition required considerable negotiation, to avoid the sustaining of a

[The Governor et al. vs. McEwen et al.]

loss; this has been effected with no other than that arising from delay in the use of the money.' Respondent conceived it to be his duty to make the negotiations here alluded to; and will state to the court, that they consisted of such negotiations as are usually resorted to for the purpose of effecting such an object, including loans of unbankable money to individuals on time, sometimes without interest, to be repaid in bankable funds. These negotiations were not undertaken to make private gain for respondent, but to save the school fund from loss, as well as himself: for without these, respondent must have suffered severely from this source, since he has always charged himself with the full amount of money received, without noticing the kind of funds in which it was paid. This is one of the reasons why there was, at that time, and for some time afterwards, considerable amounts of money on hand uninvested. In the same report to the legislature, respondent laid before that body another cause of the accumulation of a surplus in his hands, in the following words: 'He might have invested more than he has done in bank stock, but considering its depreciation in market, and that the bank has ceased to declare any dividend since the first of January last (1837), and as the legislature would shortly convene, he thought it prudent not to extend such investments beyond those already made.' Before respondent, however, had made this report, the legislature had, by resolution, on the 2nd of October, 1837, (see pamphlet laws of 1837-8, page 437) directed respondent not to invest any common school fund which might be in his hands, or which he might afterwards receive, in the stock of the Planters' Bank of Tennessee, but that he should retain the same in his possession until otherwise directed by the General Assembly. Respondent looked upon this resolution as an approval of his omission to invest the school fund in Planters' Bank stock. In respondent's said report he called the attention of the legislature to the course which he had pursued, not only as above stated with regard to his omitting to invest the fund in stock, but also in regard to loans of the fund on the following terms: 'What money, not invested in bank stock, could be safely and securely used to advantage by being loaned, or in the dis-

[The Governor et als. vs. McEwen et als.]

count of paper, has mostly, with the above exception, been so applied; thereby producing a profit upon the sum thus employed, of \$3,537 50 cents, above stated. But in times so disastrous to the mercantile community, great caution was necessary; and no loans have been made, or paper discounted, where there was believed to be any hazard, or where any loss has been incurred.' In the course thus pursued, he considered himself authorized by the 11th section of the act creating the office which he holds, and prescribing its duties. Respondent begs to refer the court to said report, as the same stands printed in the journal of the senate of the legislature of 1837-8, from pages 517 to 520, and prays that it may be taken as part of this his answer. The legislature did not condemn respondent's proceedings in the premises. The receipt of unbankable funds was not forbidden. The conversion of those funds into those that might be bankable, was not prohibited. The employment of the fund in loans and discounts was not disapproved. The negotiations necessary to convert the fund from bad to good, were left, he thought, to his discretion. And on the 19th of January, 1838, in the third section of the act to establish a State Bank, &c. it was enacted, 'that the money belonging to the common school fund, which now may be in possession of the Superintendent of Public Instruction, or which may hereafter come into his possession, shall be handed over to the President and Directors of the Bank of Tennessee, as capital in said Bank,' &c. The Bank commenced its operations on the 5th of July, 1838, on which day respondent deposited in it \$46,893 78 cents, and continued to make deposits therein till the 29th of November, 1839, when his said deposits amounted to six hundred and fifty-five thousand eight hundred and sixteen dollars and ninety-eight cents (\$655,816 98 cents.) In the meantime the collection of the school fund went on; and as the course previously pursued and reported to the legislature had, as he thought, been approved, he continued to follow it, the same causes still continuing to exist and operate, which had led to its adoption at first: accordingly in his biennial report, submitted to the legislature on the 8th of October, 1839, he detailed his proceedings as he had done to the legislature of

[The Governor et alia. vs. McEwen et alia.]

of 1837. He begs to make said report a part of this his answer, and to refer the court for the same to the journal of the House of Representatives, from page 771 to 784, inclusive. Respondent was surprised to find that what had not been looked upon as irregular, much less criminal, by the legislature of 1837-8, was now esteemed illegal and utterly indefensible. The receipt of uncurrent money on any account, or for whatever reason, was now pronounced unauthorized; and it was laid down, that your respondent was liable for interest on all sums received by him and not invested in bank stock, or not deposited in bank, notwithstanding it might have been received in unbankable funds, and so must have been converted before invested or deposited: for it was said, that the receipt of unbankable funds was originally illegal, and the approval of that course by the legislature of 1837-8, and their resolution that your orator should keep the funds in his hands till the Bank of Tennessee should be in a condition to receive it, as well as all that they did in the premises, would go for nothing. But your respondent avers, that loans and discounts of the common school fund in his hands, held and retained there because he deemed it inexpedient to invest it in Planters' Bank stock, as well as loans of said fund made for the purpose of converting it into bankable funds, and all the negotiations thereof made for that purpose, were within the spirit of the act of 1835, above referred to; that the approval of the said loans, discounts and negotiations, by the legislature of 1837-8, is equivalent to an authority to make the same; that a principal cannot at one moment approve and ratify the act of his agent, and in the next pronounce the same act illegal and unauthorized, and hold the agent responsible as if his act had never been approved and ratified; that the securities taken for such loans and discounts, and in the course of such negotiations *bona fide* on behalf of the principal and in the regular course of the dealings reported to the principal, and acquiesced in and approved by the principal, are binding upon the principal, and the agent is not responsible for the result of them, and that this is the case, both as to those loans, discounts and negotiations which were made and had before the report, and to those after it. And your respondent shows to your honor,

[The Governor et al. vs. McEwen et al.]

that all the securities enumerated and particularly designated in the bill, and therein averred to have been taken on loans or discounts of school funds, were either taken upon such loans or discounts, or were taken in order to enable this respondent to convert unbankable funds into bankable; and he avers that the whole of said loans, discounts and negotiations were approved by the legislature: some of them were within the spirit of the act of 1835 aforesaid, and the rest were within the letter, as incident to the power and duty of investing the school fund in bank stock and of depositing it in the Bank of Tennessee as capital. Much the largest part of said loans, discounts and negotiation, occurred in the two first years of your respondent's service; but he has not preserved the original securities given for said loans and discounts, and he kept no book of such loans and discounts, so that he cannot state with precise accuracy how often they have been renewed, but he can state that the interest paid on such renewals has been fully accounted for. It is true, respondent was elected to the office of Superintendent of Public Instruction in the month of February, 1838, and that he qualified and gave bond as stated in the bill. Respondent denies that it was his duty immediately upon his re-election to collect the money loaned out by him, and he avers that it was neither his duty nor in his power to collect it till the expiration of the credit allowed on said loans. He denies that it was his duty to invest any part of said fund in Planters' Bank stock at any time after the commencement of his second term of service, or to deposit the same in said bank. He denies that he has invested any part of said fund in property on his own account, nor otherwise invested it in property than as it may be said to be invested when property has been taken in mortgage or trust to secure the repayment. Respondent continued to deal with the school fund during his second term of service, just as he had done in the first, so far as the same causes existed to justify it, and no farther."

This answer contains the substance of the defence made by defendant McEwen and sureties.

Some proof was taken which need not be set forth here.

[The Governor et al. vs. McEwen et al.]

The case was argued before Chancellor Bramlett, at the May term, 1841, on bill, answers, replications and proof, when a decree was entered, which is as follows.

"It appeared to the court, that said Superintendent had, previously to the time of suspension of specie payments by the banks in May, 1837, invested large sums of money which he had collected in stock of the Planters' Bank of Tennessee, and after the creation of the Bank of Tennessee, had invested large sums of money in stock of the Bank of Tennessee, as required by law, and that he had from time to time collected large sums of money over and above expenses and disbursements, which had not been invested either in stock of the Planters' Bank or in stock of the Bank of Tennessee, and that he had loaned out to different persons at different times large sums of money so collected, and in particular to John Scott, with whom he was connected in business, and McEwen, Whiteman & Co. of which firm he was a partner. It is ordered, adjudged and decreed, that it be referred to the Clerk and Master, to take an account of all sums of money collected by said Robert H. McEwen as Superintendent of Public Instruction, belonging to the common school fund, colleges or academies, during the time of his continuing in office, or which by reasonable diligence he might have collected, and of whom and when the same was received, and how invested and disposed of, and what reasonable expenses have been paid by him and disbursements made, and how much was invested in Planters' Bank stock and when, and how much was invested in stock of the Bank of Tennessee or deposited in said Bank, and at what time; and in taking said account, the Clerk and Master may examine the defendant upon oath, and require the production of all books, papers and vouchers, and take the depositions of witnesses for plaintiffs and defendant, and state separate accounts for the first two years, to the time of executing the second bond, and an account subsequent, from the date of second bond; and the following directions will be observed by the Clerk and Master in taking and stating the account: Upon the money loaned John Scott, compound interest will be calculated, and also on the money loaned to McEwen, Whiteman & Co. and also if any balances

[The Governor et als. vs. McEwen et als.]

remained in his hands over six thousand dollars (which sum the court think it reasonable for him to retain in his hands for the redemption of the notes of the old Bank of Tennessee, and other contingent expenses) before the time of the suspension of specie payments in May, 1837, which was not invested in stock of the Planters' Bank of Tennessee, compound interest shall be calculated in the same manner. The court is also of the opinion, that the investment in Planters' Bank stock should have been made in a reasonable time after the redemption of the money, which would be one month, and interest should be calculated after such period had elapsed; and subsequent to May, 1837, it was no breach of trust to cease to invest the moneys collected in Planters' Bank stock, as the same had become depreciated. This court is also of opinion, that the defendant had a right to receive of all his agents such funds as were received by them previous to the time of suspension of specie payments, if the same were current and passing at par when they received them and for a reasonable time afterwards; and the defendant was authorized to loan such uncurrent funds, with or without interest, for a reasonable time, to be returned in good funds; but if any loans were made before the month of May, 1837, they were unauthorized, and the defendant is to be liable therefor, as the paper was up to such time uncurrent. Defendant is not liable for receiving in depreciated bank paper any debts if the same were doubtful as to the solvency of the debtors, if he used such means as a prudent man would have done in his own business under like circumstances, or if he used the same modes of collection as other agents of monied institutions; and defendant will be permitted to show the kind of funds he received in payment of any debts, and the circumstances under which the same was received, and if it shall appear he acted with a view to the security of the fund in such particular case, then he is not to be charged with good funds when he received the debts in depreciated paper, except from the time when he converted the same into good funds after the suspension of specie payments, unless the debts were well secured, in which event he was not authorized to receive uncurrent money. The court is of opin-

[The Governor et al. vs. McEwen et al.]

ion, that the defendant was not authorized to loan money or funds to the Holly Springs Bank, or to any other persons in Mississippi, and is properly chargeable with any loss that happened thereby. The defendant is not to be charged with interest on any money in his hands after the suspension of specie payments, to the time when the State Bank went into operation in 1838, unless the said money was loaned or used by him in his own business, or in trade; and where interest or profit was receivable, defendant must account for principal and interest secured, except in cases where defendant can show before the Master that the fund thus loaned was received in depreciated paper under the circumstances before stated, and the object of the loan was to convert it into good funds, and then, if the same was secured and deemed good at the time, defendant is not to be charged therewith, except as before stated; but all other loans would be without authority. The Clerk and Master will charge the defendant with simple interest in all cases except the money loaned to John Scott and McEwen, Whiteman & Co. and when it appeared to have been used by defendant himself in his own trade or speculations. And the Clerk and Master will take an account of all the property, of every description, belonging to the common school fund, colleges or academies, which was under the control of the defendant during the time of his continuance in office, making to the defendant all just allowances, and will make his report to the next term of this court, until which time all other matters are reserved."

The defendants appealed.

At the December term, 1841, the case was argued by the *Attorney General* and *F. B. Fogg* for the State, and *R. J. Meigs* for the defendants; when the following opinion was delivered.

REESE, J. delivered the opinion of the court.

The 10th section of the 11th article of the reformed constitution of Tennessee declares, that the fund there called the common school fund, "shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropria-

[The Governor et al. vs. McEwen et al.]

tion, and the interest thereof shall be invariably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools; and it shall be the duty of the General Assembly to appoint a board of commissioners for such term of time as they may think proper; who shall have the general superintendence of said fund," &c. The legislature, in 1835, in pursuance of this constitutional mandate, organized such a board, to consist of the Treasurer of the State, and a Superintendent of Public Instruction, the latter to be elected by the legislature for a period of two years, to be the President of the board, to give bond for the faithful performance of his duty, and to possess the powers and to discharge the duties more particularly enumerated in the act referred to, ch. 23. On the 24th of February, 1836, R. H. McEwen, having been previously elected Superintendent of Public Instruction, gave bond with six others as his sureties, for the faithful performance of his duty according to law, and on the 19th day of February, 1838, the said R. H. McEwen, having been re-elected to said office, gave bond as before, with the same six sureties, parties to the first bond, and two other additional sureties. The complainants, in their bill, in substance alledge, that McEwen has omitted and failed to collect debts, which by reasonable diligence might have been collected; that of the sums by him collected he omitted to vest a portion in bank stock, according to law, and that he also omitted to deposit the same in banks on the best terms, or to deposit the same at all; that he retained large sums of money in his hands, employed large sums in mercantile and manufacturing establishments, in which he was interested as a partner, and loaned out, and vested in notes, bonds and bills of exchange large sums; sometimes receiving a greater rate of interest than six *per cent.* and sometimes stipulating for no interest; and that he withholds from his successor the moneys, securities and books belonging to the office, and refuses to disclose the dates and amounts connected with the above transactions; and the bill prays an account, and that a receiver be ap-

[The Governor et al. vs. McEwen et al.]

pointed, &c. To this bill a demurrer was filed, because the plaintiffs had, it is said, an adequate remedy at law upon the bonds. But it is most obvious, from the case made out in the bill, not only that a court of equity has jurisdiction, but that it is the more appropriate forum for investigation and relief; the cause presenting numerous and varied enquiries, touching difficult and complicated matters of account. The jurisdiction of the court can admit of no serious question.

But it is contended, in the second place, that the bill is multifarious. In what does this consist? The plaintiffs have a common claim against R. H. McEwen and six of the other defendants as to both bonds, and as to the whole time covered by account sought, and as to every particular thereof; and as to the the two additional sureties in the second bond, the claim, although circumscribed in time and amount, is identical in character with that effecting the others, involving questions of charge and discharge of the same nature and description. This doctrine of multifariousness, in each particular instance, peculiarly refers itself to the sound legal discretion of the Court, to be guided by the analogies of the decided cases, the principle of which, however, is the attainment of justice, by means the most convenient and least embarrassing. To have one bill against McEwen and six of the defendants, and another bill against said McEwen and those six with two others, would promote neither justice nor convenience; because if the latter two defendants had not a right as parties to examine and superintend the taking of the first account, the interest of the six would be to throw as much as possible of the responsibility, properly falling within the first period, upon the second period, so the one account is susceptible of being not only more conveniently, but more justly taken. We cannot, therefore, hold this bill to be multifarious.

The grounds of defence set forth in the answers, and in the argument of counsel here, although stated in resistance to the account prayed for in the bill, would have been more properly presented to our consideration, if urged with a view to ascertain and regulate the principles upon which the account should be taken. Those grounds in general are, that the duties imposed

[The Governor et al. vs. McEwen et al.]

upon this officer by the act of 1835, ch. 23, are of great variety and much difficulty, involving necessarily the concession as the exercise of discretion; that the funds to be collected had been previously in the hands of public agents, and that the act itself provided that by means of public agents the Superintendent should collect the funds; that the funds, scattered over the whole State, might be properly received by those agents, in a local currency, good at the points where received, although not bankable in Nashville; that in May, 1837, there was a general suspension of specie payments, involving in its consequences great fluctuation in the nominal value of bank paper, and disastrous changes in the credit and circumstances of individuals; that the stock of the Planters' Bank, in which the Superintendent was directed by the statute to invest the money by him collected, greatly depreciated, and that he ceased to invest in it; that under these circumstances he loaned out the money in his hands, some of it being uncurrent at the time, without interest, for a limited period, payable in better funds, and some of it upon interest, and that he communicated these facts and circumstances to the legislature in his report early in October afterwards, and that they thereupon adopted a resolution that he should not invest any further funds in the stock of the Planters' Bank; that they were silent on the subject of his system of loans, and that he was afterwards re-elected by that legislature to the office which he then filled.

These facts and circumstances, particularly the last referred to, are of very great value to the principal defendant, especially in their bearing upon the question of personal character involved in these transactions; but they do not, any of them, nor all of them taken together, constitute a bar to the account prayed for in the complainants' bill.

If it was deemed by the Superintendent inexpedient after the suspension, to invest the funds under his charge in Planters' Bank stock, he ought to have done the next thing indicated in the same statute,—deposited the money for the best interest he could, in those banks which were the public depositories of the State, and from which the proof shows he could have received six *per cent.* interest. If a portion of his funds were uncurrent,

[The Governor et al. vs. McEwen et al.]

he should have deposited so much as would have been received. It was never contemplated by the legislature, that the large sums which it was known he would receive should continue in his hands and under his control; all experience having shown, that very large amounts of the funds of others can seldom, if ever, be securely kept, and interest paid thereon, for any length of time, by any individual, however prudent and honest. The constitution itself intended the principal to be a perpetual and permanent fund and the interest to be certainly paid; for upon the punctual payment of the latter and the certain preservation of the former, would depend the success and prosperity of the common school system, so far as the fund and its proceeds could contribute to such an end. It needs no reasoning, therefore, to establish that the complainants are entitled to have an account; and the only consideration of importance remaining is, as to the principles upon which it should be taken.

Those principles must be sought in the nature of the duties to be performed, and the characters and circumstances of the transactions as shown in the pleadings and proofs. The measure of fiduciary responsibility, in the view of a court of chancery, will be the same, whether arising from public or private relations. The absence of *mala fides* in either, will be regarded as an important circumstance. Where that is absent, and we assume that it is absent in the present case, the public, high and impressive as is the motive to preserve a just accountability in all its agents, is yet without adequate motive, when compelled to enforce this accountability, for its refusal to extend to the case those fair and equitable principles of adjustment which belong to the subject of agency in general.

In the first place, then, as to the character of the funds to be collected, we are of opinion that the defendant was *prima facie* bound to collect such funds, and such funds only, as were at the time and place receivable by the State, through its agents, in the collection of its public revenue according to law. This was also *prima facie* the duty of the subordinate agents, specified in the act, and employed in making the primary collections. This being the *prima facie* duty of all, that duty as a matter of fact will be presumed, *prima facie*, to have been done,

[The Governor et al. vs. McEwen et al.]

and that money of this description was in fact received. And where money of this description was in fact received, current at the time and place of reception and by subsequent events, and before the lapse of reasonable time in which to invest or deposit it, it became uncurrent, either in the hands of the Superintendent or of the subordinate agents, the loss to the extent of its diminished value shall not fall upon the Superintendent; and where money has been received by the Superintendent or the subordinate agents, not current at the time and place of its reception, the loss to the extent of its diminished value shall not fall on the Superintendent, if he can make it appear that his reception of it, or that of his subordinate agents, was at the time and with reference to the circumstances and situation of the debtors prudent and proper for the probable benefit of the public.

As to sums which the defendant has omitted to collect, he will be held responsible, where it can be shown that the collection might have been made by the use of reasonable diligence.

As to interest, it results from the principles already stated, that the defendant will in general be held to account. In the cases where, for the purpose of converting uncurrent into current money, the defendant loaned out money for a specified time, without interest, he shall not during such time be charged interest therefor, if the remission of interest in the particular case amounted to a fair equivalent for the discount on the money.

The defendant will in general be charged with six *per cent.* only. But we think the principle of compound interest was properly applied by the Chancellor to so much of the funds as were used in the mercantile and manufacturing establishments in which the defendant was interested as a partner.

The sum of six thousand dollars, without interest, directed by the Chancellor to be considered as a fund in the hands of the defendant for the purpose of taking up and redeeming the outstanding notes of the old bank, we think a reasonable and proper amount.

[The Governor et al. vs. McEwen et al.]

DECREE.

This cause came on to be heard this 8th of January, 1842, upon the bill, answers, replications, exhibits and proofs in the cause, and after hearing the transcript of the record, from the Court of Chancery at Franklin, read, and the argument of counsel on both sides, this Court is of opinion and doth declare, that the complainants are entitled to an account of the matters stated in the bill, from the defendant McEwen, former Superintendent of Public Instruction, and that the securities in both bonds were properly made parties, and that so much of said decree as orders an account to be taken, be affirmed. And this Court is of opinion, that if it was deemed inexpedient by the defendant McEwen to invest the funds under his charge in Planters' Bank stock, after the suspension of specie payments in May, 1837, it was his duty, in accordance with the provisions, to have deposited the money for the best interest he could in those banks which were the public depositories for the State and from which, as is proved in this case, he could have received interest, at the rate of six *per cent. per annum*; and if a portion of the funds were uncurrent, he should have deposited so much as would have been received. This Court is of opinion, and do declare, that the defendant McEwen was *prima facie* bound to collect such funds as were at the time and place receivable by the State, through its agents, in the collection of its public revenue according to law; and this was also the *prima facie* duty of the subordinate agents specified in the act, and employed in making the primary collections; and in taking the account, that duty, as a matter of fact, will be presumed to have been performed, and money of this description to have been received; and when money of this description was in fact received, which was current at the time and place of reception, and subsequent events, and before a reasonable time in which to invest and deposit it, it became uncurrent either in the hands of the Superintendent or the agents, the loss, to the extent of its diminished value, shall not fall upon the Superintendent; those circumstances being proved by him. And where money has been received by the Superintendent or the agents, not current at the time and place of its reception, the loss to the

[The Governor et al. vs. McEwen et al.]

extent of its diminished value shall not fall upon the Superintendent, if he can make it appear that the reception of it at the time, and with reference to the circumstances and situation of the debtors, prudent and proper, and for the probable benefit of the public. This Court is also of opinion, that as to sums which the defendant McEwen has omitted to collect, he will be held responsible, where it can be shown that the collection might have been made by the use of reasonable diligence. The defendant will in general be charged with simple interest, upon the sums received by him, except the sum of six thousand dollars, which was directed in the decree below to be considered as a fund in the hands of defendant, for the purpose of taking up or reducing the outstanding notes of the old bank, for which no interest shall be charged, during the period it was the duty of the defendant by law to redeem such notes, and after that time interest will be charged on the 6000 dollars also; and as to the sums of money used in the mercantile and manufacturing establishments in which defendant was interested as a partner, and those loaned to McEwen, Whiteman & Co. and John Scott, compound interest will be charged.

It is therefore ordered, adjudged and decreed, that it be referred to Benjamin Litton, a commissioner, or in case of his refusal or inability to act, to some other commissioner to be appointed by one of the Judges of this Court, as the Clerk and Master is related by consanguinity to one of the defendants in this case, to take an account of all sums of money collected by Robert H. McEwen as Superintendent of Public Instruction, belonging to the common school fund, colleges or academies, during the time of his continuance in office or afterwards, or which by reasonable diligence he might have collected and of whom and when the same was received and how invested and disposed of, and what reasonable expenses were paid by him and disbursements made, and how much was invested in Planters' Bank stock and when and how much was invested in stock of the Bank of Tennessee or deposited in said bank and at what time, and how much was deposited in other banks and when; and in taking said account, the commissioner will observe the directions heretofore given, and shall examine the

[The Governor et als. vs. McEwen et als.]

defendant upon oath, and require the production of all books, papers and vouchers and take the depositions of witnesses for complainants and defendants, and state separate accounts for the first two years, to the time of executing the second bond; and an account subsequent to the date of the second bond, to the time when defendant McEwen ceased to be the Superintendent, and showing the balances due from him at each of those periods. In case any money remained in the hands of the Superintendent over the sum of 6000 dollars, previous to the 27th of May, 1837, which was not invested in Planters' Bank stock at the expiration of a month after it was received, interest is to be calculated thereon after the expiration of the month, until the time it was invested, and after that period of the suspension of specie payments by the bank, if the money in his hands was not deposited upon interest, then interest is to be calculated upon the sums received by him from the date of their reception, except in cases where for the purpose of converting uncurrent money, which he proves he has received, under circumstances before stated, into current money, the defendant loaned out the money for a specified time, without interest, he shall not during such time be charged interest therefor, if the remission of interest in the particular case amounted to a fair equivalent for the discount upon the uncurrent funds.

The Court further order, adjudge and decree, that the said R. H. McEwen is not chargeable with interest on any sums in his hands on the 2nd day of October, 1837, (when the resolution of the legislature was adopted, directing him to invest no more money in bank stock till otherwise directed by the General Assembly;) nor any interest on any sums collected by him between the 2nd of October, 1837, and until the 5th of July, 1838, when the Bank of Tennessee went into operation, unless it shall appear that said money was, during that period, used by said R. H. McEwen in his private business, or loaned out by him, and if loaned out, the Superintendent is to be charged with whatever interest it shall appear he has received; or in case he received no interest, he is to be charged with interest, upon the principles herein before stated. And the commissioner will take an account of all the property, of every de-

[The Governor et als. vs. McEwen et als.]

scription, belonging to the common school fund, colleges or academies, which was under the control of the defendant during the time of his continuance in office, making all just allowances, and make his report to the next term of this Court; and the receiver appointed by the court below will continue to discharge the duties of his office, and deposit the money collected by him in the Bank of the State, as ordered by the Court of Chancery. And the complainants are entitled to have the notes and claims due the fund, in the receiver's hands, appropriated to payment of the balances due; and the receiver will make his report from time to time, to the clerk of this Court in vacation, and also to the next term of this Court; and all other matters are reserved until the coming of the report of the commissioner, or the further order of this Court.

Benjamin Litton was appointed special commissioner to take the account.

The case was continued on affidavit of defendant at the December term, 1842; and on the 30th November, 1843, the commissioner made a report to the Supreme Court.

This report states, that it appeared from the proof taken, that Alabama and Mississippi bank paper, and the paper of other southern States, constituted the principal circulation of the State of Tennessee in 1837, 8 and 9, and that the depositions of such of the county agents as had been taken state that they took in payment of debts due the school fund such paper as was in circulation, and that they received Alabama and Georgia money and that they remitted the same to the Superintendent, but no one of them states the amount so remitted, the kind of paper or what proportion thereof was uncurrent; and as the defendants had not proved the reception of any particular sum of money of any particular kind, the commissioner could make no estimate as to whether the interest of the money was a fair equivalent for the discount upon the uncurrent money.

The commissioner reported a balance in the hands of defendant McEwen of \$154,370 14.

This report was excepted to by the defendant.

[The Governor et al. vs. McEwen et al.]

On the 19th day of January, 1844, the General Assembly adopted the following resolutions:

"Whereas a suit is now depending in the Supreme Court of this State, in the name of the Governor of the State and others against Robert H. McEwen and his securities; and some of said securities have petitioned the legislature for relief, for reasons set forth in their memorial: therefore

"Resolved by the General Assembly of the State of Tennessee, that William Carroll, Willoughby Williams and Nicholas Hobson of Davidson county, and John Marshall of Williamson county, be and they hereby are appointed commissioners to compromise and settle with the securities of Robert H. McEwen, late Superintendent of Public Instruction the matters in controversy in said suit, upon principles of right and justice towards the securities and to the best interest of the school fund.

"Resolved further, that the compromise and decision of said commissioners, or a majority of them, when made and returned into said court, shall become the judgment of the court so far as the securities are concerned; and for any sum that may be awarded against them, they may have time, in the discretion of the court or the commissioners, to pay the same upon its being secured to the satisfaction of the court: provided, however, that in the compromise and settlement proposed, the securities shall admit and recognize the validity and force of the bonds given by them as the securities of said Superintendent; and provided further, that the securities of Robert H. McEwen shall cause him to secure to the satisfaction of the court, by a lien on his lands in this or any other State, or otherwise, the amount of college and academy funds or claims received by him, for which his securities may be liable; provided, that nothing herein contained shall be construed to stop proceedings or lessen the liability of Robert H. McEwen, late Superintendent of Public Instruction.

"Resolved, that two months shall be allowed as time for the return of the report of the commissioners, and for the securities to give the security required; and if the whole shall not be accomplished in the time prescribed, the securities shall be liable as though this resolution had not passed."

[The Governor et al. vs. McEwen et al.]

Under these resolutions, the commissioners (Marshall and Williams having declined acting and others being appointed in their stead) allowed a credit of \$56,474 38, moneys deposited in the State Bank by the receivers appointed to collect the notes and obligations taken by defendant McEwen to secure the sums loaned; and being allowed \$50,000 for losses by the reception of uncurrent money and interest on said abatement, reported a balance against the securities of \$10,797 86.

This report the securities moved the court to have entered as the judgment of the court against them.

This was resisted by the *Attorney General* and *F. B. Fogg*, on behalf of the State.

B. F. Fogg, for the complainants.

The intention of the framers of the constitution, as expressed in the 10th section of the 11th article, was to provide a permanent security for the common school fund and to prohibit any action by the legislature that would diminish the principal, or prevent any appropriation of the interest otherwise than for the support and encouragement of common schools, and for the equal benefit of the people of this State in the diffusion of education. It made it the duty of the legislature to appoint a board of commissioners who was to have a general superintendence of the fund, which consisted both of public and private donations, and which previously was subject to the uncontrolled discretion of the legislature. This clause protects this fund to the same extent as individual property is protected by law; was intended to prohibit legislative interference, and to afford the same security that belonged to private rights. The Assembly could increase, but not diminish the fund. In accordance with this provision in the constitution, the legislature, by the act of 1835, c. 23, incorporated the "Board of Commissioners of Common Schools for the State of Tennessee," with power to "sue and be sued, and execute all acts, matters and things which a corporation or body politic in law may and can lawfully do and execute." With the exception of modification, alteration or repeal, this contains the grant of a charter. Though repealed, it still continued to be the duty of the legislature to

[The Governor et als. vs. McEwen et als.]

comply with the provisions of the constitution. The legislature is prohibited from authorizing the fund or any part of it to be diverted to any other uses than the support of common schools. When a corporation is established in whom the whole of this fund is invested, with full authority to preserve and collect the amount due, the ordinary courts of justice are designed and established for the purpose of enforcing the laws and constitution, and resort is to be had to those tribunals for relief against or in favor of the corporation. It has been decided by this court, that a special tribunal could not be constituted for the determination of suits commenced by the Bank of the State against its officers, that the courts established by law had the whole jurisdiction, and that the judicial power was granted by the constitution, and was separate and distinct from the legislative. 2 Yerger, 590, *Bank vs. Cooper*. It is conceded by the counsel for complainants, that if the matter in controversy in this cause was a portion of the public revenue of this State, or of any other property to which the State had a complete right, the legislature could give or grant it away as it pleased, or appoint commissioners to do so. But this fund is pledged to a particular purpose, legislative control is taken away, it is vested for the benefit of common schools, and the resolution of the Assembly interfering with the decree of this court is partial in its operation, takes away vested rights, and gives certain individuals privileges that are not extended to others. It substitutes an award of commissioners for a decree of this court, and orders this court to register the edict. If this power is in the legislature, could it not act directly and release the securities altogether? The Board of Commissioners as a corporation could compromise doubtful claims; and where a portion of the fund was likely to be lost, it could secure a part and release the balance, and such a course would be sanctioned by the established principles of courts of equity, without the necessity of introducing a new system for the benefit of particular persons. To guard against such dangers arising from acts of legislation was the design of the provisions in the constitution.

Public corporations are such as are created for particular pur-

[The Governor et als. vs. McEwen et als.]

poses, as counties, cities, towns and villages, and are subject to the control of the legislature; but when empowered to take or hold private property for municipal uses, such property is invested with the security of other private rights. 2 Kent's Com. 295, 4th edition. So the same author says, Corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. So in *Dartmouth College vs. Woodward*, 4 Wheaton, 697, 700, it is said, that grants of property, and of franchises coupled with an interest, to public or political corporations, are beyond legislative control, equally as in the case of the property of private corporations. See also *Terrell and others vs. Taylor*, 9 Cranch, 42.

The corporation created by the act of 1835 makes the corporators trustees, not for the public merely, as connected with the administration of the government, but for the use of common schools. The constitution is imperative, that the fund shall be sacred, and therefore, we contend that it is placed beyond legislative control.

Edwin H. Ewing, for defendants.

Attorney General, for the complainants.

1. It was the intention of the framers of the constitution by the adoption of the 10th section of the 11th article, to withdraw the common school fund from the fluctuation incident to ordinary legislation, as in their judgment it was not likely that any thing would occur which would render a change of policy on so vital and enduring a subject necessary. They commanded the legislature to create a board of commissioners and vest them with the control and superintendence of this fund. The words of the constitution amount to a direction to the legislature to create a *permanent quasi corporation*, and to vest such corporation with certain power and rights in trust for the benefit of common schools. A. & A. on Corporations, 17; 2 Kent, 221; 15 Mass. 192; 5 Cowen, *Grant vs. Fancher*.

This was done by the legislature in the first session after the adoption of the constitution. A body politic and corporate was

[The Governor et al. vs. McEwen et al.]

created, consisting of three public officers, and the fund vested in their hands. See act of 1835, ch. 23.

The legislature reserved the power to alter, modify or repeal this charter. If the position assumed be true, to wit, that the constitution commanded the creation of a quasi corporation, and that quasi corporation be established by the legislature, it follows, by well established principles, that though the legislature had the power to alter or modify the constitution of the corporation, it had no power totally to abolish the corporation, resting, as it did, on the basis of the constitution, without providing at the same time an equivalent corporation, succeeding *eo instanti* to its powers, rights and privileges. He did not insist, that these officers, who were the constituent parts of the corporation, had any private right vested in them to the fund, but that the constitution and the law, in pursuance thereof, had created a permanent trust fund and the corporation a permanent trustee, in whose hands were lodged the control and superintendence of it.

This fund was thus lodged in the hands of a board of men composed of public officers limited in their tenure of office and periodically responsible to the legislature by the expiration of their terms. They were at all times for malversation in office subject to supervision and correction by the judiciary, at the instance of the legislature or any one of the corporators, or any inhabitant of any school district in the State. *Lowry vs. Francis, treas.* 2 Yerger, 535; Cooper's Eq. 40; 2 Humphreys, 433. It was intended by the framers of the constitution to be lodged in the hands of the permanent and constitutional trustee, and the perpetuation of the fund secured by those general rules of law and evidence which are the safeguards of all trust estates; and whether the legislature or the judiciary was the better depository of the power of enforcing those rules of law and evidence, the convention chose to decide.

2. The constitution having commanded the legislature to create a quasi corporation and vest it with the control of the fund, and such corporation having been created and vested with such power, and suit having been instituted by the Governor and Board of Commissioners against individuals liable to them

[The Governor et al. vs. McEwen et al.]

for a portion of the fund, and the question as to the legal administration of the trust having been referred to the judiciary, the question is presented, whether the legislature have the power to divest this quasi corporation of all power over the fund, supersede the operation of the rules of law and evidence, and vest an absolute power over the fund in the hands of a body of men unknown to the constitution and law, and not responsible in any way? This quasi corporation is in full constitutional and legal existence. It is a complainant now before the court, represented by an attorney, and having full power to do all acts and things which an individual may lawfully do, claiming the protection which the rules of law and evidence give to the security and perpetuity of this fund. Can a mere resolution which is required to be read only once in each house, and which does not require the usual formalities of a law, abrogate and annul the powers which are vested in this legally existing corporation, and withdraw this fund, not only from its hands, but from the control of the rules of law and evidence? He thought not. If these commissioners were designed as a court of justice, proceeding according to the rules of law and evidence, the appointment of such a court was unconstitutional and void. See *Cooper vs. State Bank*, 2 Yerger, 619.

3. But admitting that the legislature had the power whilst the corporation was in existence, to annihilate by a resolution all its power over the subject matter of the school fund, and as the original and primary trustee of the fund to resume its trust, it is contended, that the legislature had no power to delegate to a body of men unknown to the constitution and the laws, an absolute power over the fund, uncontrolled by the rules of law and evidence, because the legislature itself had not such power over the fund. The constitution provides, that the fund shall be perpetual; that it shall never be impaired by legislative appropriation, and that no law shall be passed diverting it to any other use than the support of common schools. This is a direct prohibition upon legislative power, and there is a fulness and variety in the phraseology used which shows the convention did not intend the provision should be evaded by quibbles about the meaning of the terms used indicating the extent of the

[The Governor et als. vs. McEwen et als.]

restriction. The fund shall be perpetual, and shall never be lessened by direct appropriation or indirect diversion. Admitting that the legislature is the primary trustee and retains much residuary power in reference to the general management of the fund, it is insisted that the question now involved affects the principal of the fund and not its mere regulation or management; that the question involved affects the integrity and perpetuity of the fund. This is too plain to admit of argument, because the validity of the bonds has been adjudicated upon in the last resort: the discharge of them is a discharge of the evidences of debt and of the liability. It is therefore a question as to the power of the legislature to surrender the fund by act or resolution. That a direct surrender would be unconstitutional and void, would not be contested. The substance of the constitutional provision is, that the fund should not be impaired or in any way diminished by legislative action. The adoption of this report as the judgment of the court, will impair, divert and diminish this fund. The thing the constitution declares shall not be done, is to be done. But it is contended, that the legislature had the power to manage and control the fund, and that it has the power of all trustees to compromise and settle doubtful claims and debts, and that the claim in this case, the solvency of the defendants being doubtful, presents a case in which, the fund being in jeopardy, the legislature had the right to surrender a part in order to save the balance. This argument is founded on an erroneous assumption of law and fact.

In the first place, it is an adjudicated point, that the legislature, previous to the amendment of the constitution in 1835, was a trustee of at least a portion of the school fund. It was settled, in the case of *Lowry vs. Francis*, 2 Yerger, 535, that "the State of Tennessee held the legal title to the school lands in trust for the people of the respective townships, the proceeds to be appropriated to the support of schools in the same;" and that the acts of the General Assembly ordering the sale of such lands, were in violation of the compact with the State of North Carolina, made in 1789, and void. The attitude of the State of Tennessee in regard to a portion of this fund, may be there-

[The Governor et al. vs. McEwen et al.]

fore regarded as fixed by adjudication and the legislature constituted a trustee. The constitution was altered, to secure permanently the whole fund. Now, admitting that the legislature remains the primary trustee of the fund for the benefit of all the people of Tennessee, is its power supreme and uncontrollable? Can the legislature vest an arbitrary and uncontrolled discretion over the funds in the hands of a body of men who may act in defiance of the rules of law and evidence in the disposition of the fund? Can the legislature itself disregard the rules of law and evidence, or in other words, is the conduct of the legislature not subject to be revised by the judiciary, at the instance of the inhabitants of the townships? It is. The conduct of the legislature in reference to a portion of this fund was revised and overruled by the Supreme Court in the case above alluded to, of *Lowry vs. Francis*. Admitting, then, that the State of Tennessee is a trustee for the fund, and the legislature is the rightful organ for the administration of the trust, and that "under certain circumstances the trustee is held capable of exercising the discretionary powers of a *bona fide* proprietor for the preservation of the estate," (Levin on Trusts, 209,) yet it is contended, that such questions are judicial and not legislative questions, and are in all cases referable to the judiciary, either at the instance of the trustee to obtain the direction of the court, or at the instance of the *cestuis que trust* to restrain the illegitimate action of the trustee. The trustee in this case interferes and attempts to dismiss the suits, or control the action of the court in regard to them. It is demanded on behalf of those beneficially interested in the preservation of the fund, that the suit be permitted to be controlled by the rules of law and evidence; and that if so done, there will be no impairment or diversion of the fund; and that if the report is adopted, as the action of the legislature on the subject, the fund is necessarily impaired. Now, it is contended, upon well settled principles, that before the court would direct that to be done which results in a surrender of a portion of the fund for the alleged purpose of securing the balance, the trustee should make out a state of facts, which would show that the adoption of the report or the action of the legislature, as the judgment of

[The Governor et al. vs. McEwen et al.]

the court, was necessary for the preservation of the fund and not for its destruction or impairment. There is no purpose manifested in the face of the resolutions of the General Assembly, that it was necessary to surrender a part of this fund to secure the balance, except as to the validity of the bonds. This amounted to nothing, because the validity of the bonds had been before that time duly established and decreed. Nor is there any thing in the report of the commissioners which would sanction the idea that such a surrender of the fund was necessary. On the contrary, they give the credit, (which is resisted here) on the grounds of justice to the defendants, to wit, that the Superintendent had received uncurrent money, the loss on which he had suffered.

No such state of facts is alledged either in the face of the resolutions, or the report; nor is there any proof in the record to justify such an assumption. This is therefore a case where the adoption of the action of the legislature will be to sanction "the ruinous and mischievously exercised discretion of the trustee;" and is a proper case for the exercise of the injunction powers of a chancery court; and, under the circumstances, should be disregarded by this court. Levin on Trusts and Trustees; Sugden on Powers, ch. 7; 1 V. & B. 359; 2 V. & B. 138; 7 Ves. 480; *Walker vs. Smallwood*, Amb. 676; 10 Vesey, 104.

TURLEY, J. delivered the following opinion of the court.

The legislature of the State of Tennessee, actuated by the universally received opinion, that the education of the masses is the only basis upon which our free institutions can be safely rested, has assiduously labored for a series of years, extending from 1826 to 1835, to create a fund for the establishment of a system of common schools, for the education of the citizens of the State. Great anxiety has at all times been shown by this body, not only for the creation, but for the preservation of this fund: every available means, after making proper provision for the administration of the government of the State, has been appropriated to it, and proper steps taken to preserve and

[The Governor et al. vs. McEwen et al.]

make it effectual. A board of common school commissioners in each county was appointed to superintend it; and by the act of 1827, ch. 64, s. 1, it was appropriated forever to the purposes for which it was designed.

In the year 1835, a convention of the State was called, for the purpose of amending the constitution; and among other important things to which the attention of that body was called, that of education seems to have occupied a prominent position.

In the 10th section of the 11th article of the constitution as amended, it is declared, that knowledge, learning and virtue are essential to the preservation of republican institutions, and that the diffusion of the opportunities and advantages of education, throughout the different portions of the State, are highly conducive to the promotion of this end. For the furtherance of which, it makes it the duty of the General Assembly, in all future periods of this government, to cherish literature and science: and to insure this, it provides, that the fund, commonly called the school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation; and the interest thereof shall be invariably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and that no law shall be made, authorizing said fund, or any part thereof to be diverted to any other use than the support and encouragement of common schools; and that it shall be the duty of the General Assembly, to appoint a board of commissioners, for such term of time as they may think proper, who shall have the general superintendence of said fund, and who shall make a report of the condition of the same, from time to time, under such rules, regulations and restrictions as may be required by law.

The first General Assembly of the State, after the adoption of the new constitution, met in October, 1835, and by an act of that date, chap. 23, made provisions for carrying into effect

[The Governor et al. vs. McEwen et al.]

the requisitions of the said 10th section of the 11th article of the constitution. The first section of the act provides, "that the Treasurer of the State, the Comptroller of the Treasury, and an executive officer, to be called the Superintendent of Public Instruction, who shall be appointed by joint vote of both branches of the General Assembly, shall be, and they are hereby created and constituted a body politic and corporate, by the name and style of the Board of Commissioners of Common Schools for the State of Tennessee, who shall have perpetual succession, and by the name and style aforesaid may hold and possess property of every kind, in trust, for the use of common schools, may sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all courts of record, or in any other place whatever; and also to make, have and use a common seal, and the same to break, alter and renew at their pleasure; and generally to do and execute all acts, matters and things which a corporation or body politic in law may and can lawfully do and execute." It further provides, that the Superintendent of Public Instruction shall be President of the Board of Commissioners, and that all notes, bonds, obligations, transfers, or other instruments of writing, made or executed by the Board, shall be signed by him, and when necessary, sealed with the corporate seal of the Board; which Board shall be subject, nevertheless, to legislative modification or repeal."

The second section provides, that "the Superintendent of Public Instruction shall hold his office for two years, and until his successor shall be elected and qualified, and shall, before entering on the discharge of his duties, enter into a bond, with good and sufficient security, to be approved of by, and made payable to the Governor of the State, in the sum of one hundred thousand dollars, conditioned for the faithful discharge of the duties of his office."

In pursuance of the provisions of this statute, the General Assembly of the State elected Robert H. McEwen, one of the defendants, Superintendent of Public Instruction, in the year 1836, who entered into bond, with the other defendants as his sureties, to Newton Cannon, the then Governor of the State,

[The Governor et al. vs. McEwen et al.]

with the penalty prescribed by law, and entered upon the performance of the duties of his office. At the expiration of the term for which he was thus appointed, he was re-elected by the General Assembly; and having again executed his bond, with the same securities, in like penalty, he continued for the space of two years more to discharge the duties of Superintendent of Public Instruction, when another was elected in his stead, and he ceased to have any further connection with the Board of Common School Commissioners.

In the year 1840, the Attorney General, in pursuance of instructions from the General Assembly, given at its session of 1839-40, filed this bill, in the name of James K. Polk, Governor of the State, and successor of Newton Cannon, and in the name of the then existing Board of School Commissioners, seeking to charge the defendant McEwen and his sureties upon the bond, for his alledged malversation in office as Superintendent of Public Instruction.

The case was brought to a hearing in the Chancery Court at Franklin, and an account decreed by the Chancellor, from which an appeal was prosecuted to this court. At the December term, 1841, the case was brought to hearing in this court, an account ordered, and the bases upon which it was to be taken specified, in an opinion delivered by one of the Judges of the court; but before this account could be taken, and acted upon by the court, the General Assembly again met, viz, in October, 1843, when the defendants the sureties of the said Robert H. McEwen, petitioned that body for relief, assigning as reasons therefor, the impossibility of taking the account upon legal principles, without doing them great injustice, and this arising from the deranged state of the currency at the time the common school fund was collected by the Superintendent, from which it necessarily resulted that a large amount of money was received by him in paper of different banks of the United States greatly depreciated, and from the manner in which they had been kept it was impossible to ascertain within any thing approximating to certainty what the loss thus sustained by the fund was,—and for other causes, not necessary here to specify.

On the 19th day of January, 1844, in accordance with the

[The Governor et al. vs. McEwen et al.]

prayer of the petitioners, it was resolved by the General Assembly, that William Carroll, Willoughby Williams, Nicholas Hobson, and John Marshall, should be appointed commissioners to compromise and settle with the sureties of Robert H. McEwen, late Superintendent of Public Instruction, the matters in controversy in said suit, upon principles of right and justice towards the sureties, and to the best interest of the school fund; and that the compromise and decision of said commissioners, or a majority of them, when made and returned into the Supreme Court of the State, should become the judgment of the court, so far as the sureties were concerned.

On the 27th day of January, 1844, it was further resolved by the General Assembly, that if either of the commissioners before appointed should, from unforeseen circumstances, be unable to act, or should decline to act, the Governor of the State is authorized to appoint other commissioner or commissioners, in the place of such commissioner or commissioners, as shall thus be unable or unwilling to act. Accordingly, John Waters and M. W. Brown were appointed commissioners by the Governor, in the place of Willoughby Williams and John Marshall, who declined acting under the resolutions of the 19th of January, 1844.

On the 3rd day of February, 1844, said commissioners, viz, William Carroll, N. Hobson, John Waters and M. W. Brown, made their report of compromise, which was filed in court, and asked to be made the decree of the court upon the matters in controversy, so far as the rights and interest of the sureties were effected thereby. This is resisted by the counsel for the complainants, upon constitutional grounds.

It is argued, that the 10th section of the 11th article of the constitution places the school fund beyond the control of the General Assembly, and vests in the Board of Commissioners of Common Schools, who alone have the power to collect, compromise, and arrange any debts or demands belonging to this fund, and placed under their supervision by the act of 1835, chapter 23, and that therefore the resolutions of the General Assembly of January 19th and 27th are in violation of the provisions of the constitution, and null and void.

[The Governor et als. vs. McEwen et als.]

In the argument of this proposition it becomes important to enquire, 1st, What was the power of the General Assembly over the common school fund previous to the adoption of the amended constitution of 1834: 2d, What alterations has the instrument made as to this power, and what prohibitions has it introduced in regard to its exercise.

That the legislature of the State, in the absence of constitutional prohibition, is the proper guardian and protector of its funds, no matter for what purpose appropriated, and that, as such, it is its duty to watch over them, to see that they are properly secured, vested, and applied, as the law may direct, is a proposition so palpably in accordance with reason and necessity, that it were a waste of time to enter into an argument to prove it. It necessarily follows, that if these funds, or any portion of them, be out of the treasury, and in the hands of a citizen, the power to collect, compromise, and arrange the same with the citizen, belongs to the legislature, to be exercised according to its best judgment, for the security and prosperity of the State, and upon principles of right and justice to the citizen.

This power on the part of the legislature is supreme, and when exercised, cannot be revised, or called in question by any other power whatever; and it may be exercised by that body in its collective capacity, or it may be delegated to a commission,—the decision of which, when made in pursuance of the power delegated, is equally final and conclusive, if the delegation extend thus far. There is in this respect no difference arising out of the nature of the fund. The power is the same, be the fund appropriated or unappropriated—whether it has been set apart for internal improvement, banking operations, common schools, or any other purpose whatever. This power is inherent in the legislative department of the State, and it is neither lost nor diminished by the fact, that curators may have been appointed for the safe keeping of the funds, or to superintend the distribution of them in pursuance of appropriations made by law, such as a treasurer, commissioners of internal improvements, president and directors of a bank founded upon State funds, board of commissioners of common schools, &c. Then the power of the legislature over the school fund,

[The Governor et als. vs. McEwen et als.]

previous to the adoption of the constitution of 1834, was absolute and uncontrollable. It might have been diverted from the purposes for which it was created, at any time, and directed in an entirely different channel: it might have been squandered and wasted upon any wild scheme of speculation or improvement: it might have been appropriated to the payment of our public debt: it might have been distributed in bounties and premiums to our citizens: it might have been given to asylums: it might have been applied to lighten the burden of taxation for the time being; or disposed of in any other way, that might have seemed meet and proper to that body.

Such was the power over this fund, on the part of the General Assembly, at the adoption of the constitution of 1834.

2nd, What is it since?

We have seen that the legislature of the State had evinced for years much anxiety to promote a system of common schools; that great attention had been paid to the accumulation of sufficient funds for that purpose; that all available means had been appropriated to it; that a board of common school commissioners had been established in the different counties to superintend it, and that in 1827 legislative provision had been made for the appropriation of this fund forever to the use of common schools.

What change upon this question has been effected by the constitution of 1834? But two. The legislature of 1827 had appropriated the fund forever to the purposes for which it was created. This was a legislative promise, that it should be held sacred; but inasmuch as this promise was not legally binding on subsequent legislatures, the framers of the constitution of 1834 were determined to make it sure, by establishing it as a fundamental principle, not to be violated by legislative enactment. Accordingly, the 10th section of the 11th article makes the fund perpetual, the principal of which shall never be diminished by legislative appropriation, and the interest of which shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and prohibits the passing of any law authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools.

[The Governor et als. vs. McEwen et als.]

This, then, is one change made upon the system as it existed at the time the constitution was adopted. What is the other?

It is made the duty of the General Assembly to appoint a general board of commissioners for the State, (in place of the board of common school commissioners previously appointed in each county of the State,) who shall have the general superintendence of said fund, and who shall make report of the condition of the same from time to time, under such rules, regulations and restrictions as may be required by law.

The constitution of 1834, then, prohibits the legislature from doing one thing in relation to the subject, which it might have done previously, to wit, passing any law diverting either the principal or interest of the fund from the purpose for which it was designed,—the support of common schools. And it makes it the duty of the legislature to do one thing which it was not previously bound to do, viz, to appoint a board of commissioners for the State, to have the general superintendence of the fund. All other things are left as they were previously to the adoption of the constitution; that is, subject to the control and discretion of the legislature.

The question then arises at once, Is the adoption of the resolutions of the General Assembly of the 19th and 27th of January, in relation to the matter in controversy, a violation of either the prohibitory or mandatory provisions of the 10th section of the 11th article of the constitution of 1834? We have seen, that these resolutions are for the appointment of commissioners to compromise and settle with the sureties of Robert H. McEwen the matters in controversy, upon principles of right and justice towards the sureties, and to the best interest of the school fund. We have endeavored to show, that the power to settle, arrange and compromise any suit, or demand for money due from a citizen to the general treasury of the State, or which may have been appropriated by the State to any public institution or charity, is inherent in the legislative department of the State, and may be exercised without supervision or control, and that this power may be delegated. The exercise of this power, like all others belonging to the legislative department, can only be restricted by constitutional provision. Is the exer-

[The Governor et als. vs. McEwen et alr.]

cise of it, in the present case, in conflict with the constitutional prohibition to pass any law diverting the school fund, or any part thereof, to any other use than the support of common schools? We think most clearly not. It is not an attempt at appropriation, but an effort to arrange, compromise and secure a portion of the school fund in the hands of an individual citizen, which was in jeopardy, and but for the existence of this power, and its exercise, might have been entirely lost. It is not an attempt to divert the fund to improper uses, but merely the surrendering a portion, in order to secure the balance. That the power to do this ought to exist, and does exist somewhere, is not denied by the counsel who appear for the complainants: but it is argued that it properly belongs to the Board of Commissioners of Common Schools; that it is dangerous to trust it with the legislature, and that by fair implication it has been taken from it.

To this, it is to be answered: 1st, That the power of the legislature cannot be restricted by implication; it must be by express prohibition. 2nd, The argument that a power may be abused, is no argument against the vesting it. All human power is liable to abuse, no matter where it is vested; and in the present case there is as much safety in the exercise of it by the legislature as by the Board of Commissioners of Common Schools; perhaps more. If public opinion, and the responsibilities of the members to their constituents, will not guarantee a proper exercise of it, what assurance have we that a Board of Common School Commissioners may be entrusted with it? In avoiding Scylla, let us be careful that we do not fall upon Charybdis.

But is this power given to the Board of Common School Commissioners, either expressly or impliedly? Most assuredly it is not by the constitution. Is it by the act of 1835, chap. 23?

The General Assembly has thought proper to incorporate the Board of Commissioners for Common Schools, as a matter of convenience, not that the constitution directed it, and has authorized them, as a body corporate and politic, to hold and possess property of every kind in trust for the use of common schools, to sue and be sued, &c. and makes the Superintendent

[The Governor et al. vs. McEwen et al.]

the President of the corporation. Now, that this board has the power to make all contracts relative to the school funds, which are not prohibited by law, and that they may sue and be sued upon them, as a body politic and corporate, and that it may, in its discretion, arrange, compound and compromise any debt due to it, no one will be disposed to deny; but that it has the power to institute a suit against the Superintendent of Public Instruction, for malversation in office, may, we think, well admit of much controversy, because his liability arises out of no contract with the board: he is not appointed by it; his responsibility is not to it, but to the Governor of the State. He is, himself, a member of the board, and the head of it—How shall he bring himself to account? or, shall the Treasurer and the Comptroller, the two subordinate members of the board, act upon the subject without him? Shall he compound and compromise with himself; or shall the other two do so with him? It is in vain to attempt to get rid of these difficulties, by saying he can be removed, and another substituted in his stead. It is true, this has been done in the present case; but it is equally true, that he might be sued upon his bond without being removed, and it is a case that might easily happen. An honest difference of opinion might exist as to his liability in some particular transaction, and this might be of great moment to the prosperity of the school fund, and yet he be a very useful and honest officer, worthy of being retained, and as such retained; what would then be done? It is not necessary for us to say how this is in the present case; for, even if this power had been given by the act of 1835 expressly to this incorporated board of commissioners, yet the legislature of the State of Tennessee would not be deprived of it thereby. These public corporations are made for public convenience; no private rights are involved in them; and therefore the legislature in interfering with them is in no danger of violating the obligation of contracts or public faith; and although it may have thought proper to delegate a portion of its own legitimate power to such corporation, for the public benefit, yet the same may be resumed at any time, and exercised temporarily by the legislature, at its discretion; or the corporation may at any moment

[The Governor et als. vs. McEwen et als.]

be deprived of it altogether; and such has been the constant practice in this State in relation to debts due our State Bank, which the legislature have been in the habit of compromising by resolution, though no one doubts that the president and board of directors have full power to do so themselves; and this constitutes an important difference between a public corporation and a private one. The one is completely under the control of the legislature, and the other is not, because it is the creation of a contract between the State and a private individual or individuals, which cannot be interfered with without violating that provision of the constitution which preserves the obligation of contracts.

We are therefore of the opinion, that the resolutions adopted by the legislature of the 19th and 27th of January, 1844, appointing commissioners to compromise and settle the matters in controversy in the present case, is no violation of any rights vested in the incorporated Board of Commissioners for Common Schools; nor is it a violation of that portion of the constitution which prohibits the passage of any law for diverting the school fund, or any portion thereof, to any other use than the support and encouragement of common schools; and that the legislature had full power and authority inherent, to adopt said resolutions; that it was the proper mode to appoint the commission; that the commissioners had full power and authority delegated to them to make the compromise; that it has been made in pursuance of that power, and is binding and obligatory upon this court and all persons concerned, and do decree accordingly.

HAYNIE et als. vs. HALL's ex'r. et als.

1. The statute of limitations does not run in favor of an express trustee against *cestui que trust*. It is otherwise as to trustees by operation of law.
2. Where an executor paid over money due legatees to a third person, such person held the money as trustee by operation of law, and the statute of limitations applied.
3. The father as natural guardian of his children has no right to intermeddle with their estate.
4. Where there is a fraudulent concealment of the cause of action, the statute commences running from the time of the discovery of such cause of action; but where the rights of the party depended on recorded documents, there must have been such misrepresentations as prevented the party from investigating his rights.

This is a bill filed in the Chancery Court at Gallatin. It was tried by Chancellor Cahal, on bill, answers, replications and proof. The Chancellor decreed in favor of the complainants; from which decree the defendants appealed.

Baldridge, for complainants.

J. J. White, for defendants.

Guild, for complainants.

GREEN, J. delivered the opinion of the court.

This bill is filed by the children of Jesse Haynie, deceased, against the executor of their father's will, to recover certain moneys which they alledge came to the hands of the testator in his lifetime, and which belonged to them under the will of their grandfather, Elijah Humphreys, who died many years ago in North Carolina.

The facts are shortly these: The defendant's testator, Jesse Haynie, had married Rhoda, the daughter of the said Elijah Humphreys, who in 1794 by his will devised certain negroes to his daughter Rhoda Haynie for life, and after her death, to her children, if any of them come of age, to be divided equally among them. By another clause in the will, he directed that after the death of his wife all the residue of his estate be divided into five parts—one part of which to go to the children of his daughter Rhoda Haynie, to be secured to them by his

[Haynie et als. vs. Hall's ex'r. et als.]

executors, and to be delivered to them as they should come of age, share and share alike.

Rhoda Haynie died in 1815, at which time the right of the complainants to the negroes devised to her for life accrued. The money arising from the residuary clause of Elijah Humphreys' will, to which the complainants were entitled, was received by their father (if received by him at all) in the year 1805, and previously.

This bill was filed in 1842. The defendant relies on the statute of limitations as a bar to the recovery of the negroes, or money demanded by the bill.

The Chancellor dismissed the bill as to the claim of the negroes, but decreed for the complainants the sum of two hundred and twenty-five dollars, with compound interest. The defendant appealed, and the complainants prosecute a writ of error.

Lewis Haynie, the youngest of Rhoda Haynie's children, was born 20th of January, 1806, and was upwards of thirty-six years old when the bill was filed. His right of action had accrued, and his disability to sue had been removed for fifteen years. Each of the daughters of Rhoda Haynie arrived at the age of twenty-one years, and were married after the death of their mother. So that more than three years elapsed after the action accrued to each, and neither of the complainants fall within any of the exceptions of the statute.

But it is argued, and so the Chancellor thought, that as regards the money legacy due the complainants from their grandfather's estate, and which it is assumed their father received in 1805, the statute of limitations does not apply; that he held the money as a trustee of such character, that a court of equity will not permit him to rely on the lapse of time. The statute of limitations prescribes, that certain *forms* of action shall be barred within the terms limited, and therefore in its terms it does not apply to courts of equity; but the courts of chancery, both of Great Britain and this country, have uniformly held, that in cases where any remedy exists at law, if a court of chancery gains jurisdiction of a cause, the time fixed in the statute as a bar to the action at law will also be a bar to a bill in chancery. All that class of trusts, therefore, that become such by matter

[Haynie et al. vs. Hall's ex'r. et al.]

of evidence, where a party takes possession in his own right, are equally subject to the operation of the statute of limitations in courts of equity, as would be the corresponding actions prosecuted in a court of law. But in express, or direct trusts, created by the contract of the parties, the statute of limitations does not operate. In such cases the trustee takes possession, and holds for another. His possession is the possession of that other, and there can be no adverse holding, until the trustee denude himself of his trust, by assuming to hold for himself, and notifies the *cestui que trust* of his treachery. In these cases, no action at law can be maintained. The remedy is only in a court of equity. The statute of limitations, therefore, has no application to them. Apply these principles to the case before us: The complainants are entitled to a sum of money in North Carolina, by the will of their grandfather. Their father procures the executor of Humphreys' will to pay this money to him. Now, in receiving it, how does he become a direct or express trustee? He stood in no legal relation to the parties by which he was entitled to receive it, as an executor, administrator, or guardian does: on the contrary, he was their self-constituted agent. He received the money by wrong, and held it in his own right.

But having possessed himself of the money of these complainants, they had a right of action against him to recover it, and might have sued him at law, for money had and received.

In the case of *Smart vs. Waterhouse*, (10 Yerg. R. 94,) Waterhouse, the executor, was held to be an express trustee, and not protected by the statute of limitations; but that case differs materially from the one before the court.

The executor of Elijah Humphreys' will was an express trustee; but when Jesse Haynie received the money from said executor, he was placed in a very different relation to the complainants from that in which the executor had stood. The law, to be sure, would turn him into a trustee; but he did not become such by contract, but was such by implication of law, because of his wrongful possession of money which did not belong to him: nevertheless, he held it in his own right and for his own benefit, adversely to the complainants.

[Haynie et al. vs. Hall's ex'r. et al.]

This distinction is plainly taken in the case of *Armstrong vs. Campbell*, (3 Yerg. R. 212.) In that case Campbell acted under a contract with Armstrong, and the court held that he was an express trustee, and was not protected by the statute of limitations: but Trimble, who purchased for Campbell with a knowledge of the trust, but who had nothing to do with Armstrong, was regarded as a trustee by implication of law, and it was held that the statute of limitations was a bar to a recovery against him. That case presents the very principle of the case before us. The executor of Humphreys is an express trustee: but he pays over the money to Haynie, who becomes a trustee by operation of law. The executor could not plead the statute of limitations, because his possession was the possession of the complainants, but Haynie is protected by the statute, because his possession was adverse to the complainants and for himself.

It is argued, that the defendant's testator was the natural guardian of his children, and as such was an express trustee.

It is true, the father is the natural guardian of his children; but he is the guardian for nurture only. He has no authority to intermeddle with their estate. Besides, his guardianship for nurture ceased upon his children becoming of age.

It is argued, that the cause of action in this case was unknown to the complainants, and was concealed by the defendant's testator by fraud. But of this allegation there is no evidence. The mere fact, that Jesse Haynie did not disclose to his children all the facts in relation to their grandfather's will, and his own reception of money from the estate, does not constitute fraud. The will was of record in North Carolina, and they knew that they had rights growing out of the provisions of that will. Their father could not conceal from them a knowledge of their rights, if they had chosen to investigate them. Had he made false representations to them, by which they were prevented from investigating the matter and ascertaining their right of action, it would have been a concealment of the cause of action by fraud; and in such case the statute of limitations would commence to run only from the time the cause of action was discovered. But no such misrepresentation is proved,

[Miller vs. Porter.]

and his mere silence under the circumstances was no fraudulent concealment.

Much is said in the argument about the rigor of Jesse Haynie's parental government—of the influence he exercised over his children, causing them to acquiesce in his demands—and their forbearance to sue, lest they should offend him. Doubtless, the disinclination to offend their father, and their expectations from his estate, constituted (and very properly) the controlling motive in preventing the institution of this suit in his lifetime. But these circumstances can have no influence in the decision of this cause, as they constitute no exception to the operation of the statute of limitations.

Reverse the decree, and dismiss the bill.

MILLER vs. PORTER.

An order to the sheriff, made by an execution creditor at the instance of a surety, to suspend proceedings on *fi. fa.* and a return of the *fi. fa.* endorsed "stayed by order of plaintiff," will not discharge the surety.

Porter recovered a judgment in the Circuit Court of Maury county, on the 6th day of January, 1841, against Smith and Miller. Smith was the principal and Miller a surety. An execution issued on the 13th day of February, 1841. Smith applied to Porter for indulgence, and having paid a portion of the judgment, and having agreed to pay ten *per cent.* on the balance, the execution was returned to the clerk's office by the sheriff, by order of the plaintiff, endorsed "stayed by consent of plaintiff." No other execution was issued till the 7th day of February, 1842, at which time the money could not be collected from Smith.

This bill was filed in the Chancery Court at Columbia, by Miller, alledging the facts, and praying that he might be discharged, by reason of the conduct of the principal and the debtor without his concurrence therein.

[*Miller vs. Porter.*]

The bill was tried by Chancellor Cahal, on bill, answer, replication and proof, at the March term, 1844.

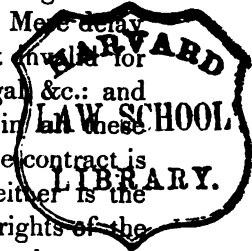
He dismissed the bill, and complainant appealed.

Wright, for complainant.

If we take it that Miller was surety in the face of the note, then it must be conceded, that a contract legal and for value, between Porter the creditor and Smith the principal debtor, by which indulgence was obtained, would not discharge Miller the surety. *Peay vs. Poston*, 10 Yer. Rep. 111. Mere delay will not discharge the surety, nor will a contract invalid for want of consideration, or for a consideration illegal &c.; and perhaps a usurious agreement will not; because in all these cases the hands of the surety are not tied up. The contract is not valid and the creditor not bound by it. Neither is the surety who is entitled to be subrogated to all the rights of the creditor. All these cases go upon the reason, that the surety is not prejudiced.

But still there are cases where the delay or negligence of the creditor will discharge the surety. One of them is, where the surety himself becomes active and requests the creditor to sue, who fails to do it, by which the debt is lost. *Thompson vs. Watson*, 10 Yer. Rep. 367. In such a case the surety is injured and the conscience of the creditor affected. And it is said such a case goes beyond the principle of mere delay and stands upon other grounds. And in *Cepel vs. Butler*, 2 Sim. & Stuart's Rep. 457, (1 Cond. Eng. Ch. Rep. 543,) it is held, if by the neglect of the creditor, the benefit of some of the sureties for the debt is lost, the surety is *pro tanto* discharged. A mere failure to register a mortgage will have the effect. The creditor is a trustee for the surety and cannot by his negligence or positive acts, be allowed to destroy or release liens, &c.

The same principles are to be found in *Hays vs. Word*, 4 John. Ch. Rep. 128. In this case Porter had issued his execution and placed it in the hands of the sheriff. Smith the principal debtor was then good and the money could have been made. The issuance of the execution was a lien upon all of Smith's estate and gave this debt priority over all others. Mil-



[*Miller vs. Porter.*]

ler was interested in this lien and had a right to have it perfected for his own indemnity. Good faith in Porter required that nothing should be done to disturb it. But what does he do? He makes a new contract, receives \$180 00 in cash and is to receive 10 or 12 *per cent.* for indulgence, instructs the sheriff not to make the money and the execution is returned to the following court and all its liens lost and no new writ issued for many terms. In consequence of this delay the debt is lost. But for the improper interference by Porter, Smith would have paid the debt and saved Miller. This case certainly ought to meet with relief.

In *Sneed vs. White*, 3 J. J. Marsh, 526, it is held, "a stay of execution by a creditor after its levy on the property of the principal debtor will exonerate the surety if the lien of the levy be extinguished." So in *Jones vs. Bullock*, 3 Bibb, 467. And in *Givens vs. Briscoe*, 3 J. J. Marsh, 534, "if one of several equitable owners of an execution indulge the principal to the prejudice of the surety, it might be a ground to exonerate the surety to the extent of his interest in the execution." *Vide also Rathbone vs. Warren*, 10 Johns. Rep. 587; Peck's Rep. 36, 37 and 38.

That the issuance of an execution creates a lien to which the surety has a right of substitution is settled. *Wade et al. vs. Green et al.* 3 Hump. Rep. 557, 558.

Baxter, for defendant.

Mere passive delay in collecting the debt from the principal never discharges the surety. *Deberry vs. Adams*, 9 Yerger, 52; Chitty on Bills, 442.

When giving time to the principal is relied on, some specific definite time must be agreed on. Chitty on Bills, 445-6; 1 Boss & Pul. 652. The proof in this case shows no definite time. It only shows that a proposition was made by Smith to pay Porter ten *per cent.* so long as Porter would indulge him, and the utmost that Porter agreed to was not to push. Porter never agreed to hold up the execution any definite time.

Agreements for time must be founded on a valuable and sufficient legal consideration. If there was any consideration in

[*Miller vs. Porter.*]

this case, it was usurious and void, therefore insufficient. *Chitty on Bills*, 447; *Philpot vs. Bryant*, 4 Bing. Rep. 717; 8 Term Rep. 168; 5 East, 234; 4 Barber's Eq. Dig. 653.

Under the statute laws of this State, after judgment has been obtained against principal and surety on a note or bill single, and the party who obtains the judgment agrees with the principal to stay execution for six months, it is held, that such agreement does not discharge the surety. *Peay vs. Poston*, 10 Yer. 111.

REESE, J. delivered the opinion of the court.

The question raised by the facts in this case is, whether after a judgment has been rendered against principal and surety, and an execution has been issued, the surety is discharged in equity, if the plaintiff in the judgment and execution direct the officer, in whose hands the process is, to suspend proceedings upon it, and the same be returned as having been stayed by the order of the plaintiff, and this proceeding take place not at the instance of the surety, but of the principal.

The affirmative of this general proposition is not, indeed, insisted on by the complainant's counsel; but we apprehend its maintenance would be necessary to entitle the complainant to the relief prayed for in the bill. For there is no agreement proved for definite delay; so that the principle of equitable relief in favor of the surety, when the principal debtor and the creditor have made such agreement, does not arise in this case, even if such principle applied to the relation of principal and surety after the rendition of judgment, which may well be doubted; because the aim and scope of the principle itself, namely, the protection and indemnity of the surety, can scarcely exist, when the law, as in our State, gives to the surety, after judgment, such ample and summary remedies for his indemnity against his principal. If the plaintiff issues no process, or causes delay in its execution, or even if he do not this, the surety may on motion get judgment against his principal, even without paying the money on the judgment in some cases, and

[*Miller vs. Porter.*]

in all cases by doing so. But be that as it may, there was no agreement for definite delay, nor any valid and binding agreement whatever; both of which we have invariably held to be necessary to give to the surety an equitable right to be discharged.

The argument, that the surety is entitled to the lien on the property of the principal debtor, created by the issuance of the execution, would, in its results, assert the truth of the general proposition with which we started and maintain that in all cases where an execution is stayed, except at the instance of the surety, such surety is discharged in equity. For the lien claimed, would exist, if at all, in any case.

But if the surety had paid the money on the execution itself, he would be entitled to no such substitution. Because, when a party to a judgment pays it, the judgment ceases to exist, and there is nothing to be substituted to.

This is not contrary to any thing determined in the case of *McNairy vs. Eastland*, as was maintained by this court in a case determined at the last term of this court, and not yet, perhaps, reported, in which we endeavored to lay down, with some distinctness, several propositions on this subject of lien and substitution, and to define and limit the cases in which they do or do not exist.

Upon the whole, we affirm the Chancellor's decree.

CHOUNING & PAYNE vs. SIMMONS.

1. Proceedings under the act of 1806, for processioning land, must be strictly construed; and when a processional survey is sought to be set up in bar of the rights of a party, it must appear that it was made in conformity with the requirements of the statute, either by proof of their performance, or by presumption arising from long acquiescence in the survey.
2. Where a processional survey is attempted to be sustained by adoption, such adoption must be positive, mutual, and made with the knowledge of the party sought to be charged, that he was surrendering his rights.

This is an action of trespass, which, on the plea of not guilty, was tried by Judge Martin and a jury of Robertson county, at the June term, 1844. A verdict and judgment were rendered in favor of the plaintiff, from which the defendants appealed.

Turner and *Pepper*, for plaintiffs in error.

Boyd, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of trespass *quare clausum fregit*, brought by the plaintiff below, John P. Simmons, against the defendants, Richard Chouning and John C. Payne. Upon the trial, the matters in controversy between the parties turned upon the question of boundary. It appears very satisfactorily, that the lines of the tract of land owned by the plaintiff, if run according to its calls and original survey, includes the *locus in quo* the trespass is charged to have been committed by the defendants.

But it was contended, that the plaintiff, in 1828, caused his land to be processioned, under the 21st section of the act of 1806, chap. 1, by which processioning the lines were so run as to include the land in dispute, and that he so recognized and adopted the processioning survey as to estop him from claiming up to the original lines of his entry, survey, and grant. Upon this point, the proof introduced by the defendant is, that one Thomas Shaw, deputy surveyor of Robertson county, did, on the 12th of April, 1828, procession the tract of land owned by the complainant, so as to exclude the portion now claimed by the defendants; but which really belonged to the plaintiff; if

[*Chouning & Payne vs. Simmons.*]

the true line had been run in conformity with the entry and survey. This processioning survey purports upon its face to have been made for John P. Simmons, and was registered in Robertson county on the 15th day of May, 1828. There is some proof, showing that Simmons was present when this survey was made, and one or two others, interested in the question by reason of owning adjoining lands. There is also some evidence of loose and unsatisfactory admissions on the part of the plaintiff, as to his acquiescence in the survey, and that his fence was moved so as to accord therewith. But there is no proof showing a positive recognition and adoption of the survey, as thus made with the knowledge that it had deprived him of a portion of the land which had been granted to him by the State of North Carolina. Neither is there any proof that the survey was made with the formalities required by the statute under which it purports to be made; nor that the defendants, or either of them, nor any person under whom they claim, was present, countenancing and superintending.

Upon this point, the Judge charged the jury, "that the survey made by Shaw, designated in argument as the procession survey, was not as such conclusive on the plaintiff; but the jury should look to the survey, and to the acts of the parties in reference to the same, as part of the evidence in the cause, from all of which they would determine whether a binding agreement had been entered into by the parties, fixing the line run by Shaw as the boundary of their adjoining tracts; and that if the parties, being ignorant of the real boundaries, or doubtful of its exact locality, had entered into an agreement, locating the boundary, they could not depart from such agreement, although the original line might afterwards be found and identified." The jury found a verdict for the plaintiff. Defendants moved for a new trial; which being overruled, they prosecute their appeal to this court.

It is now contended, that the survey made by Shaw, and the recognition and adoption of it, is proved to have been made by the plaintiff, are conclusive upon him, and estop him from claiming to his true boundary, and that the Judge erred in not so charging the jury.

[*Chouning & Payne vs. Simmons.*]

The question upon which the Circuit Judge charged the jury is essentially different from the one now presented for our consideration.

We think there is no proof whatever, tending to show that there was ever any agreement of any kind between the plaintiff and defendants, compromising and settling this dispute in relation to their boundaries, and that it would be wholly useless to enquire as to their knowledge or ignorance of the true position of their dividing lines. The only subject, then, for investigation is as to the validity and obligatory force of the processioning survey.

The act of 1806, under which this survey purports to have been made, provides "that it shall and may be lawful for any person or persons who may be desirous of establishing the bounds of any lands, he, she or they may claim by grant from North Carolina or Tennessee, to cause the same to be processioned in the following manner, viz: Such person or persons shall cause notice to be given at several of the most public places within the county wherein said lines are to be processioned, at least twenty days before the same is to be performed, of the time appointed for the processioning, and the corner at which he intends to begin; and he shall also notify the holders or their agents, in writing, of such intention as aforesaid, if such holders or their agents reside within said county: and it shall be the duty of any surveyor appointed by the authority of this act, upon application to him made, to run, mark and describe such tract of land agreeably to former lines, or natural boundaries, described in such grant, or deed founded upon a grant; or if such lines have not been marked, to mark new lines agreeably to the calls of said grant or deed, and to make a correct plat and certificate of the same, as is required in other cases, and to return the same to the register of the county, to be recorded, at the expense of the applicant: and in any case where the lines are contested by adverse claimants, the sheriff of the county shall, upon the application of either of the parties, forthwith summon a jury to try the matter in dispute."

Now it cannot, we apprehend, be controverted, that if this processioning survey be obligatory upon the plaintiff, and

[*Channing & Payne vs. Simmons.*]

estops him from claiming according to the truth of his right, it must have been equally obligatory upon the defendants, and have created a mutual estoppel on their parts, if it had been so made as to take a part of their land and give it to the plaintiff; for estoppels must be mutual; and there would be no equity or justice in holding a man bound by a processioning survey where it operated against him, and another interested in the question not bound by it, when it operated in his favor. Then, the question arises, would the defendant have been bound by this processioning survey, and estopped from denying it, had it been to the interest of the plaintiff to maintain it, and thus to controvert it? Surely, we think not. Our constitution provides that no man shall be disseized of his freehold, except by the judgment of his peers, or the law of the land. Granting that the act of 1806 is a law of the land, under which conflicting boundaries may be settled between adjacent freeholders, and that one or the other may, under its provisions, be deprived of his lands; it surely cannot be controverted, that the proceedings under it must be construed with great strictness, as it is very summary in its operations, and may, from the ignorance, prejudice, and passions of a surveyor, sheriff and a jury, who have met together in the woods to settle a question, often of great complexity and difficulty, be productive of much mischief. We do not think, then, that it is requiring too much to say, that the forms of the statute shall be performed substantially, before such resurvey shall be obligatory and binding between the parties interested, and that when such re-survey is attempted to be set up as a bar to the right, it shall be shown that it was made in conformity with the requisitions specified in the act, either by the proof of their performance or by presumption arising from long acquiescence in the lines thus run and remarked.

There is no such proof in this case. It does not appear that notice was given twenty days before the processioning, at any public place in the county, or that the holders of adjoining lands or their agents had notice in writing of such intention, both of which are required by the statute; neither is there such an acquiescence by the parties, as will raise a presumption that the notice was given.

[Chouning & Payne vs. Simmons.]

To hold the contrary doctrine, would be to deprive a man of his land, by a proceeding in its nature judicial, without notice, when the right to the notice is not only inherently his, but given to him expressly by the statute. But, furthermore, the statute provides "that the surveyor shall run, mark and describe the land agreeably to the former lines or natural boundaries; and if such lines have not been marked, to mark new lines, agreeably to the calls of said grant." This the surveyor in this case did not do; and the necessary consequence is, that the survey is not obligatory by force of the statute, and could only become so by the adoption and recognition of it by the parties interested under it; and this recognition and adoption must have been on the part of the defendants as well as the plaintiff, or otherwise they would be permitted to blow hot or cold, as it might best suit their convenience.

In the cases of *Whitesides vs. Singleton*, Meigs' Rep. 207, and *Overton's heirs vs. Cannon*, 2 Humphreys, 264, there were no adjacent owners, the land being vacant and unappropriated, and of course the question as to notice could not arise, and did not; the controversy being between an enterer subsequent to the re-survey, and the original grantees.

In the case of *Whitesides vs. Singleton*, the court said, "The question of what acquiescence will deprive a man of a portion of his estate by making good an erroneous re-survey of his land, made without authority, and originally void, is a very grave question, when it shall become necessary to determine it."

In *Overton's* case, it is said, "To hold that a man shall be estopped from claiming his just and legal rights by a hasty, ill advised, and momentary recognition of a line which had been illegally run, we think would be exceedingly dangerous and well calculated to unsettle rights to lands, by exposing them to the fraudulent conduct of the landmonger, and the danger of having it supported by perjury, the necessary consequence of the reception of parol proof, to establish the recognition."

These principles apply with full force to the present case. We therefore affirm the judgment of the Circuit Court.

PLANTERS' BANK *vs.* UNION BANK.

Where the plaintiff procures the levy of an execution which is stayed by writ of error *coram nobis* and *superedeas*; it is held, that the plaintiff did not lose his lien, if he proceeded to sell within twelve months after the dismissal of the writ of error and discharge of the *superedeas*.

This is a bill which was filed in the Chancery Court at Murfreesborough, by the Planters' Bank, against the Union Bank, for the purpose of enjoining the sale of a tract of land, and setting up a prior lien by virtue of a *fi. fa.* which had been superseded.

The Chancellor, at the hearing, on bill, answer, replication and proof, enjoined the sale of the land.

From this decree the defendant appealed.

The facts are stated in the opinion of the court.

F. B. Fogg, for complainant.

Thomas Washington, for defendant.

GREEN, J. delivered the opinion of the court.

This is a controversy as to the priority of a lien, both the parties having a judgment against the same defendant. The Union Bank recovered its judgment at the March term of the Rutherford Circuit Court, 1841, and issued an execution tested of that term, which was levied on some personal property and upon the land in controversy, but which was returned "stayed by order of the plaintiff's counsel." An *alias* execution was issued the 13th July, returnable to the November term of the court, which execution was superseded, the defendant having obtained an order for a writ of error *coram nobis* and a *superedeas* to stay the execution until the errors assigned should be disposed of by the court.

The said writ of error was depending until the July term, 1842, when the errors assigned were disallowed and the *superedeas* discharged.

In the meantime the judgment for the use of the Planters' Bank had been recovered in the name of Simeon Marsh against

[Planters' Bank vs. Union Bank.]

a portion of the same defendants and the land in question was sold by virtue thereof, and the Planters' Bank became the purchaser.

After the writ of error *coram nobis* in the case of the Union Bank was disposed of, at the July term, 1842, a *venditioni exponas* was issued from that term, commanding the sale of the property in controversy. To enjoin a sale of this property the Planters' Bank files this bill.

The Planters' Bank insists, that the Union Bank has lost its lien on this land given by the act of 1831, because it did not cause the land to be sold within twelve months after the rendition of its judgment,—not being prevented, as the plaintiff insists, by any of the causes mentioned in the act. The first section of the act of 1831, ch. 90, provides, "that all judgments obtained in any court of record in this State shall be a lien on the debtor's land from the time said judgment was rendered; provided said judgment is rendered in the county where the debtor resides at the time of its rendition, and provided an execution is taken out upon said judgment, and said land sold within twelve months after the rendition, unless the same is prevented by injunction or writ of error, or appeal in the nature of a writ of error; in which case, if the judgment be affirmed or the injunction dissolved on motion, or the bill dismissed on its final hearing, it shall be incumbent on the creditor to issue his execution, and sell said land within one year from the time it was so affirmed, or said injunction was dissolved, or said bill dismissed."

It is argued, that a *supersedeas*, by reason of a writ of error *coram nobis*, is not within the saving of this statute, constituting an excuse for not selling within the year, because the judgment in a writ of error *coram nobis* is that the writ of error be dismissed, and not that the judgment theretofore rendered in that writ be affirmed.

We do not think this a sound construction of the statute. The legislature intended that a party who might be prevented by process of law from effectuating his lien, by a sale of the land within the year, should have a year within which to sell, after the obstruction to his execution should be removed.

[Jarrell vs. White.]

One of the obstructions they enumerate is a writ of error. The general term is used, and includes in its meaning a writ of error *coram nobis*, as well as a writ of error *coram vobis*.

The expression in the statute, that the party shall sell within a year from the time the judgment shall be affirmed, is intended only to express the will of the legislature that he shall sell within a year after the legal obstruction created by the writ of error shall be removed. If it were a writ of error to a superior court and it were in that court dismissed, instead of the judgment being affirmed, it would be within the meaning of the statute. So here, the mere technical term which is used in disposing of the cause, being somewhat different from that used in the statute, can make no difference.

Let the decree be affirmed.

JARRELL vs. WHITE.

A judgment rendered by a justice of the peace is not void because the warrant does not specify before what particular justice of the peace it was returnable.

This action of trover was tried on a plea of not guilty, by Judge S. Anderson and a jury, at the January term of the Circuit Court of Wilson in 1844, and a verdict and judgment rendered for the plaintiff. The defendant appealed.

Caruthers, for complainant.

Stokes, for defendant.

TURLEY, J. delivered the opinion of the Court.

This is an action of trover brought by the plaintiff against the defendant, a constable, to recover for the conversion of a horse and buggy. Plaintiff claims title by virtue of a sale from John M. Peace. Defendant protects himself by a sale under

[Jarrell vs. White.]

an execution against John M. Peace, and attacks the bill of sale of plaintiff for fraud.

The Circuit Judge held that he could not do this, because the judgment upon which the execution issued was void.

The warrant was issued by J. H. Bullard, a justice of the peace for Wilson county, on the 23d day of July, 1841. This warrant was returned before him on the same day by J. B. Jarrell, the defendant, endorsed "executed and set for trial the 23d of July, 1841," and judgment rendered thereon, on the same day, for \$88 18.

The judgment was held to be void, because the return does not specify before what particular justice of the peace the warrant was to be returned, and that, therefore, the justice in this case had no jurisdiction of the person of J. M. Peace, the defendant in the execution.

In this there was error. We do not think a judgment is void for such objection; at most, it could only be voidable; and, indeed, we do not think it that, when the same justice who issues the warrant renders the judgment.

To hold such strictness necessary, as the Circuit Judge has required in this case, would no doubt be productive of much mischief, in unsettling proceedings had before justices of the peace, and endanger rights acquired under them.

Let the judgment be reversed, and the cause remanded for a new trial

MILLS vs. STEWART.

A pawnee may protect himself against a fraudulent conveyance of the pawnor by virtue of his possession: but if he voluntarily relinquish the possession, his remedy at law is gone, though he may have been induced to surrender the possession by the misrepresentations of pawnor.

Stewart instituted this action of trover in the Circuit Court of Sumner county against Mills. The defendant pleaded not guilty, and a jury rendered a verdict for the plaintiff, and a judgment was rendered by Judge Maney thereupon. The defendant appealed.

Guild, for plaintiff in error.

Caruthers, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of trover and conversion brought by Patrick Stewart against John Mills. Upon the trial, it appeared that the plaintiff claimed title to the property sued for, a negro named Green, by virtue of a pledge or pawn from one John Saunders; the negro having been left in his possession as security for the return of another, named Lewis, the property of Stewart, which he had permitted Saunders to take into possession, and which was never returned.

But it further appeared, that Saunders had previously, to wit, on the 10th day of January, 1841, conveyed the negro Green in trust to secure the payment of a debt due to the defendant Mills, which deed of trust had been afterwards satisfied by a part payment of the debt, and a new deed executed on the 12th day of August, 1842, conveying the said negro Green again in trust, as security for the balance of the debt due to the defendant. In the interim between the dates of the two deeds of trust, the negro was delivered to the plaintiff in pledge as above stated. It further appeared, that the plaintiff afterwards delivered up the negro to be sold in satisfaction of the said deed of trust, and that he was sold and purchased by the defendant.

[Mills vs. Stewart.]

On the trial, plaintiff attacked this deed of trust, upon the ground that it was fraudulent, and void as to creditors, and therefore void as to him; and insisted, that when he agreed to part with the possession, and permitted the negro to be sold in satisfaction of the trust, he did so in ignorance of his rights, and in consequence of erroneous information received from defendant. Much proof is heard as to the fraudulent character of the deed of trust, and some legal difficulty is raised as to the plaintiff's right to protect himself therefrom, by reason of his possession as pawnee. We do not deem it necessary to enter into an investigation of either the one or the other, as we do not think the case turns upon either. We hold that the law is, that a pawnee for a valuable consideration may protect himself against a fraudulent reconveyance executed by his pawnor, but that this is by virtue of possession; and that if he voluntarily deliver up the possession, this right is gone: but it is contended, that in the present case such delivery of possession was not voluntary, but was induced by a misconception of his rights, produced by a want of correct information as to the nature of defendant's rights, produced by the production of the first deed of trust by him without the endorsement of a satisfaction thereon, which had been entered when the second was taken.

We think this can make no difference in this form of action. The possession constituted the plaintiff's legal title; having parted from it voluntarily, he has lost that title; and if he had been induced so to do by the fraudulent misrepresentations of the defendant, his remedy, if he has any, is in equity, inasmuch as his legal title can only be restored by a restoration of the possession, for the regaining of which he can maintain no suit at law.

We therefore reverse the judgment, and remand the cause for a new trial.

NORMENT'S adm'r. vs. WILSON et als.

Sale of interests in remainder or reversionary interests in real estate for purposes of partition, is not authorized by the statute laws of Tennessee.

Meigs, for complainant.

E. H. Ewing, for defendants.

REESE, J. delivered the opinion of the court.

The complainant has filed this bill, in order that a contract of sale and purchase made between him and a commissioner appointed by the Circuit Court of Davidson county, of a tract of land lying in said county, which sale took place in a proceeding before said court, for the sale and partition of the proceeds of said tract of land, devised by the will of George Camp to his children, may be set aside and rescinded, and the notes and securities for the consideration may be delivered up and be cancelled. George Camp devised all his real estate, and all his personal estate with little exception, to his wife Mary during her life, with certain trusts, that the younger children should be educated out of the profits of the farm and the hire of slaves, and that certain horses should be raised upon the farm for the benefit of the children, and that a certain child who was afflicted should always have a slave to wait on him, so long as one belonged to the estate; and that the property, after the death of the wife, should equally be divided among all the children, except that the child above named should have an extra slave. The wife and another were appointed to execute the will; that other renounced, and the widow alone took upon herself that burthen. Afterwards she intermarried with defendant Watson, and a daughter of the testator intermarried with defendant Wilson. These parties and the adult children, two others who were minors, not joining therein, entered into an agreement under seal, by which the children covenanted to release to Watson and wife, executor and executrix of the will, three of the negroes, in consideration of which, Watson and wife covenanted to release to the children the balance of the estate of the

[Norment's adm'r. vs. Wilson et als.]

testator, including the life estate of Mrs. Watson in the land, and the deed itself purported to contain such releases. This contract or deed was not proved or registered, and the original was some time after lost. In this state of things, Wilson and wife and the other adult devisees petitioned the Circuit Court to have the land sold for the purpose of dividing the proceeds among the devisees, under the provisions of the act of 1827, ch. 54, or the act of 1829, ch. 35; and they made the two minor heirs parties defendant, and prayed in their petition for the appointment of a guardian *ad litem*. No process was served upon such minors or was issued. The guardian *ad litem* was appointed, and he accepted notice of the petition for the minors. The sale was ordered, and the complainant became the purchaser. The proceeding in the Circuit Court was without validity. 1st: The act of 1827 is limited in its provisions to heirs and estates in land inherited by them. 2nd: The act of 1829 extends to tenants in common, in deed, and to tenants in coparcenary. Under the will, these parties were tenants in common of the remainder in the land after the determination of the life estate of the widow: she was sole tenant of the life estate, the deed not having divested her thereof, being neither proved nor registered, nor the *feme covert* previously examined. Neither act contemplates the partition by sale of reversionary interests or interests in remainder, especially as to minors; and these acts can have no amplitude of construction from their nature. The complainant under that sale most clearly did not get a good title. The whole proceeding was invalid.

It may be remarked, farther, that the agreement to sell the the real estate for life by the executor and executrix, and take therefor certain slaves, absolutely, for which the wife before had only a life estate, was an arrangement of most questionable propriety. It sacrificed and annulled the trusts of the will,—trusts in favor of minors; and in other respects it broke up the well considered arrangements of the testator as to the real and personal estate, and as to the education of his minor children.

It is said, by way of opposition to the relief prayed for in the bill, that the complainant can now get a good title. We do not think he can, by any means: and if he could, we do not think

[*Nolen vs. Crook et als.*]

it is a case, under all the circumstances, in which he should now be compelled to take such title.

Let the decree be affirmed.

NOLEN *vs.* CROOK *et als.*

A garnishing creditor will not be permitted to take from the hands of another creditor assets which have been transferred by their debtor for his debt or indemnity; and the court will determine upon the amount of indebtedness existing at the time of the decree, and will not confine itself by the allegations of the answer to indebtedness existing at the time of the answer made.

D. Campbell, for complainant.

J. Marshall, for the defendants.

REESE, J. delivered the opinion of the court.

As to B. S. Tappan & Co. this is an attachment bill by their creditor the complainant; and as to the defendant R. M. Crook, it is in the nature of a garnishment bill, filed with a view to reach certain funds and assets in the hands of the said defendant, which the bill alleges are equitably liable to the satisfaction of complainant's demand. The answer of defendant Crook states in general terms, that those funds and assets were transferred to him by Tappan & Co. on the ground of their indebtedness to him to a larger amount than those funds and assets would pay; but the proof, upon taking the account before the Master in the Chancery Court, established that those funds and assets exceeded the amount of the indebtedness of Tappan & Co. to the defendant Crook, but that they did not equal the amount of their indebtedness to him, and his liabilities contracted on their account by lending to them his name; which liabilities he had to meet by payment after the filing of the bill and before the taking of the account. Upon this state of the pleadings and of the facts, the complainant insists that he is entitled to a decree for the excess of funds assigned beyond

[Thacker vs. Chambers et al.]

the amount of the actual indebtedness of Tappan & Co. to the defendant: and the defendant, on the contrary, insists, that having stated in the answer the true reasons and considerations for the assignment, his omission to speak of indemnity, and his use of the word indebtedness, where liability would have been more appropriate, should not prejudice him, when it appears from the whole case that there is not a dollar in his hands which he may not equitably retain, or which the complainant can equitably demand should be paid over to him; that the truth and the substance of the matter is, that there are no funds in his hands to which any creditor can claim a better equity. This view of the attitude and rights of the parties in the case presented by the defendant, we are of opinion, is substantially correct. The garnishing creditor has no right to take funds from the hands of the creditor to whom assets have been transferred by their debtor for his debt or indemnity, unless his debt and indemnity have been met, and there be an excess beyond; and to make the case turn upon any narrow technical ground of pleading, would do violence to the justice of the case and the rights of the parties.

Let the decree be affirmed.

THACKER vs. CHAMBERS et als.

A decree of a Chancery Court having jurisdiction, vesting the legal title of real estate in a person is valid, till reversed or set aside on a proceeding instituted for that purpose, and the validity of such decree cannot be questioned in a collateral proceeding, on the ground that the evidence did not justify the decree.

M. M. Brien, for complainant.

Taul, for defendants.

GREEN, J. delivered the opinion of the court.

This is an attachment bill against Chambers, the debtor, who is a non-resident, and against the other defendants, to sub-

[Thacker vs. Chambers et al.]

ject the lot of land mentioned in the bill to the satisfaction of complainant's claim against Chambers, and to divest the legal title to the lot out of the other defendants.

The lot in question was sold by the Commissioners of Manchester to Joseph Hickerson, who sold to Chambers, to whom, by Hickerson's directions, the Commissioners made a deed. Chambers sold the lot by verbal agreement to Williams, who paid therefor, and went into possession; Chambers then left the country, without having the deed to himself registered, and without making Williams a deed. Williams filed his bill against Chambers, Hickerson and the Commissioners, and obtained a decree, vesting in himself the title to the lot in question, which decree has been registered in Coffee county, where the land lies.

This decree is relied on here, to show that the title to the lot is not in the complainant's debtor, Chambers, and that there was nothing to attach. The Chancellor dismissed the bill, and we think correctly. The defendant Williams has paid Chambers for the land, and has a legal title, and as complainant, the creditor of Chambers, could only be entitled to such property as Chambers had in the premises, he has no right to seize this land as the property of Chambers.

But it is insisted, that Williams did not have such evidence of his purchase from Chambers as would authorize the decree in his favor. That may be very true, but it is a matter that cannot be enquired into in this suit.

The court had jurisdiction of the cause, and having made a decree, vesting the title in the defendant, Williams, it is not competent in this collateral proceeding between other parties to investigate the grounds of proof, upon which the court acted.

Affirm the decree.

BRITAIN *vs.* COWEN.

1. The jurisdiction of the Chancery Court, to decree a sale of the real estate of a deceased person for the satisfaction of his debts, will not be defeated on the ground, that the bill is not filed in the Chancery district in which the land lies, if the court have jurisdiction on general chancery principles, independent of the special jurisdiction conferred by the statute on the ground of the location of the lands.
2. A decree against an heir, who was a minor, for the sale of lands, for the satisfaction of debts of deceased, is not void on the ground, that the heir was not served personally with process; it is sufficient if he be made a party by the bill and service of process and copy on the regular guardian.

This is an action of ejectment, instituted in the Circuit Court of Bedford county, by Britain against Cowen, for the recovery of a tract of twenty-two acres of land, lying in Bedford county.

The defendant pleaded not guilty, and the case was tried by Judge S. Anderson, at the December term, of the Circuit Court, held for Bedford county in 1844, when a verdict and judgment were rendered in favor of the defendant, from which plaintiff appealed.

All the material facts of the case are stated in the opinion of the court.

Meigs and Wisener, for Britain.

Fogg, E. H. Ewing and Davidson, for Cowen.

REESE, J. delivered the opinion of the court.

This action is brought to recover the tract of land in the pleadings mentioned, claimed by the lessor of the plaintiff, as heir and devisee of one James Britain, deceased. The defendant claims the same tract, under the decree of the Chancery Court at Franklin, subjecting the same, upon a creditor's bill, to sale for the payment and satisfaction of the debts of the testator, James Britain. If that decree be valid, or if it be not void as against the lessor of the plaintiff, then he has no right whatever to recover in this action. It is contended on his behalf, that it is void, and this upon three grounds:

1st. The want of jurisdiction in the Court of Chancery over the subject matter of the cause.

[*Britain vs. Cowen.*]

2d. That Joseph H. Britain, who is mentioned in the bill, and in other proceedings in said cause, as the general guardian of the lessor, Jason T. Britain, and made a defendant in said bill, along with the said Jason T. the minor, in that character, was not the general guardian of said Jason T., legally appointed. And,

3d. That said Jason T. was not so served with process in that cause, as that the decree will bind him.

The first ground of objection is founded upon the fact, that the land mentioned in this suit, and in the Chancery suit, lies in the county of Bedford, and that Bedford county, at the time of the institution and pendency of said Chancery suit, constituted no part of the Chancery district for the Court held at Franklin; and that the statutes conferring upon the Chancery Courts jurisdiction in such cases, require that the bill should be filed in the Chancery district in which the land lies.

But it is argued on the other side, that the Court of Chancery at Franklin, in which district some material defendants lived, and were served with process, had jurisdiction upon general chancery principles, independently of the special and local jurisdiction given by the statutes: because the bill expressly alleged, that the testator made his whole estate real and personal, by the terms of his will, subject to the payment of his debts; and if the Chancellor erred in construing the will as evidence so as to maintain this allegation of the bill, such error, although it might have produced a reversal of the decree on the ground of jurisdiction, would, nevertheless, not render the decree void in a collateral proceeding.

Assenting to the correctness of this position, we do not deem it necessary to enquire, whether what is said in the will, on the subject of the payment of debts shall have the effect to render the real estate equitable assets, and subject it as a fund to the satisfaction of the claims against the testator.

There is nothing, then, we think, in the first ground to render the decree invalid and void.

In the second place, it is said, that Joseph H. Britain was not legally appointed the guardian of Jason T. Britain.

The record of his appointment is as follows: "State of Ten-

[Britain vs. Cowen.]

nessee, Bedford county, November term, 1833. Present, George Davidson, Chairman, Samuel Philips, James Ewing and others, Justices of the Peace for said county. Proclamation being made, &c. Ordered by the court, that Joseph H. Britain be appointed guardian of Jason T. Britain, upon condition; and he gave bond and good security in the sum of thirty thousand dollars, on or before the second Monday of this court."

There was found among the files of guardian bonds, a bond filled up in the hand writing of the Clerk, who is dead, and the Clerk's fee endorsed as paid, signed and sealed by Joseph H. Britain, and by James Williams, who is proved to have been his father-in-law, and made payable to George Davidson, the Chairman of the County Court, in the penalty of thirty thousand dollars, conditioned for the faithful performance of the duties of guardian to Jason T. Britain by the said Joseph H. Britain, being in all respects a formal guardian's bond, and being dated the same day of the month and of the term with the above entry of appointment.

Other records were produced, showing that the said Joseph H. Britain made subsequently several settlements with the County Court, as the guardian of Jason T. Britain. These records taken all together, establish not only, that the said Joseph H. Britain was guardian of the said Jason T., as between him and the said Jason T., but also guardian of his person and estate, as it related to, or might affect all others in their dealings with and proceedings against the said estate.

As to the entry of appointment, there is no doubt, that it was first made, "upon condition, that he give bond with good security, on or before the second Monday of the term." If it had remained so, and he had given bond, as he did, the appointment would have been valid. But coming in subsequently the same day, and giving bond, the Clerk, upon the entry already made, interpolated the condition, "and he gave bond," &c., without striking out other words necessary so to have been stricken out, to render the entry free from obscurity. So we are of opinion, that there is nothing in this second ground, to destroy the validity of the decree.

It is said, in the third place, that the lessor of the plaintiff

[Britain vs. Cowen.]

was not duly made a party to the suit in chancery. The bill states his interest in the estate as devisee, and heir; that he was a minor; that Joseph H. Britain was his general and regular guardian; and it prays, that the minor may be made a party defendant, and also Joseph H. Britain in his character as guardian. A subpœna citing Joseph H. Britain, guardian of Jason T. Britain, to appear in said cause, was duly served upon said Joseph H., and a copy of the bill left with him. It is said that a subpœna ought to have been served, also, upon the minor personally. There is no statute, and there is no case, which directs it to be done, or holds it to be necessary.

In England they have no general guardians like ours, but suits are defended by guardians *ad litem*, on behalf of minors. Their course of practice is to serve the subpœna upon the minor; the substantial purpose for which is to apprise adult friends and connections of the commencement of a suit, to the end, that they may select and nominate to the court a suitable guardian *ad litem*. But even there, where the process cannot be served upon the infant, service upon a mother, step-father, or other relative has been held good. But here, under our system, the general guardian represents the entire estate of the minor, and also his person, of which, as well as of his estate, he has legal custody, and is under bonds, and personally responsible to his ward, if he neglects his interests in any litigation touching his estate. And the infant must appear and defend under him. Under such circumstances, and in such a system, would it not be strange to hold a decree void, to which the minor, by prayer in the bill and service of process upon the guardian, had been made a party, because not served personally with process?

As we have said, there is no statute affecting the question, as relates to a Court of Chancery; there is no practice on the subject in our State, or elsewhere, where general guardians are to be found, prescribing personal service upon the minor.

A Court of Chancery cherishes forms no further than as they contribute to the main object of its existence, the attainment of substantial justice. It struggles against technical rules, which merely impede this object. It is enabled from its mode

[*Britain vs. Cowen.*]

of practice, to see, from time to time, that necessary parties are brought before it; and this it can do at almost any stage of a suit. It has its own modes, and can vary them according to the exigency, of giving notice of the progressive steps of its action. A court of law should, therefore, see its way very clearly before it would hold a decree void upon such grounds as are insisted on in this record, when the decree comes collaterally before it. It is said, this court has held in many cases, that the minor as well as his guardian, must be personally served with process of *sci. fa.* to subject his land. This was so held, because the court thought it was *lex scripta*, positive statutory provision, exacting their simple obedience. But there is no reason why this statutory provision should be extended by construction or analogy to suits in equity.

We beg leave to make one general observation. Our ministerial officers, clerks, sheriffs, &c. are of a very brief and mutable character: From which it results, that much of the public business is crudely and inartificially done; and papers and records committed to the custody of new officers, from time to time, are likely to be incautiously kept.

In this state of things, we have strong motives of public policy, to cherish substance more than forms, and to hesitate long, and insist upon a clear case, before we pronounce the decrees and judgments of our courts of record void, when brought collaterally in question.

We affirm this judgment upon all the grounds.

WILSON et als. vs. LANGFORD, adm'r.

A contract for usurious interest is utterly void, and, therefore, a stipulation for delay, based on such consideration, is not obligatory, and though made without the knowledge of the surety, did not discharge him.

This is a bill filed in the Chancery Court at Clarksville, by a surety to enjoin the enforcement of a judgment against him.

The case was tried by Chancellor McCambell, on bill, answer, replication and proof. He dismissed the bill, and complainant appealed.

Garland, for Wilson and others.

Ewing and Chase, for Langford.

REXSE, J. delivered the opinion of the court.

The complainants were the sureties of one Geo. W. Wilson in a bill single, given by him to the defendant, for a sum of money borrowed; and they seek to be discharged upon the ground, that the defendant and the said George W. Wilson, the principal debtor, after the bill single fell due, made an agreement for further delay, upon the consideration, that the said George W. Wilson give to the defendant his separate bill single for six and one-half per cent. as additional interest upon the amount of the principal bill single, during the time of such stay, which was done; and this agreement took place without the knowledge or consent of the complainants. This allegation is expressly denied in the answer. It is, however, distinctly proved by the principal debtor, George W. Wilson, whose competency has been questioned in argument, and there are also some corroborating circumstances in the proof; but we do not deem it necessary to enquire into the competency of Wilson, as a witness in this case, or to weigh the amount of corroborating circumstances proved, so as to see whether, with the testimony of Wilson, the express denial of the answer would be counterpoised as required by the technical rule of chancery in such cases. For we consider it quite clear, that the allegation of the bill, if distinctly proved, will not entitle the com-

[*Wilson et als. vs. Langford, adm'r.*]

plainants to the relief sought. The agreement between the creditor and the principal debtor, for delay, which will entitle the sureties to be discharged in equity, must be a valid and binding agreement, one which imposes upon the creditor a legal obstacle for the time to the prosecution of an action upon the original security, according to its terms. But the agreement set out in the bill was not valid and binding; on the contrary, it was unlawful and void; it was not binding upon either party. If the creditor complied with it, and received the money secured by the smaller bill single, he subjected himself to a criminal prosecution by indictment, to fine and imprisonment. It presented not the least obstacle to his institution and maintenance of an action upon the original security, according to its terms. Such agreement, therefore, cannot discharge the sureties. There is nothing opposed to this view of the case, in what is said by the court in the case of *Washington vs. Tate's adm'r.* 3 Hump. 503. Whatever may be thought of the facts of that agreement, as constituting usury, or otherwise, it is clear that the court believed that a large portion of the consideration for that agreement was not usurious: the main circumstance in that case, also, justifying the discharge of the surety, is the actual interference of the surety, to have the debt paid by the principal, on suit brought against him, and the delusive conduct on that subject of the creditor.

Upon the whole, we affirm the decree of the Chancellor, and dismiss the bill.

PATTERSON et als. vs. McCUTCHEEN et als.

Persons entitled by law to make extension entries under the act of 1840, ch. 62, have preference over general enterers, for the term of four years from the opening of the land office, by virtue of the act of 1842, ch. 34.

This is a petition for a *mandamus*, which was filed in the Circuit Court of Giles county, by John D., James P., Andrew and Wm. C. McCutchen, against Patterson, the entry-taker for the county of Giles. They were the owners of thirty-five acres of land, lying south and west of the Congressional reservation line, and they owned no more land by deed, grant or otherwise. Adjoining this tract there lay two other small tracts of fifteen acres each, but on different sides thereof. On the 3d day of July, 1848, John G. Morris entered these small tracts as a general enterer, under the act of 1842, ch. 34. On the 23d day of the same month, the petitioners filed their affidavit with an entry embracing said land with the entry-taker, and tendered twelve and a half cents per acre for the same to him. These were refused on the ground, that the land had been entered by Morris.

The petitioners thereupon filed their petition for a *mandamus*. The defendants Patterson, the entry-taker, and Morris answered. A verdict and judgment upon the pleadings and proof were rendered in favor of the plaintiffs, from which the defendants appealed.

N. S. Brown, for plaintiffs in error.

This is a controversy between the right of extension and general entry; and may be settled by defining the terms, occupant and pre-emptioner.

1st. These terms are synonymous, and mean a mere preference right of entry to particular lands. This preference has universally arisen, directly or indirectly, from actual occupancy. One might purchase from another by assignment, but the title must be predicated in the first instance, upon actual occupancy. The legislature after allowing this preference by occupancy, subsequently provided, that such as owned less than 200 acres by deed, grant or entry, might extend upon adjacent

[Patterson et al. vs. McCutchen et al.]

vacant land, so as to make up the quantity of 200 acres. Thus extension was but another mode of becoming a pre-emptioner, and could be resorted to, only by a present owner, and it was to him a mere privilege, which he might embrace or not. See act of 1829, sections 13 and 14 pamph., page 26, also act of 1825, sec. 10, page 403.

Now, how can such a one be said to be an occupant or pre-emptioner, as to land that is vacant, absolutely unappropriated, until he has reduced it, by exercising the right of extension? It is the act of extension, that makes him an occupant or pre-emptioner, and not the mere right of extension, which he may never mature. The land in the mean time is vacant and open to the actual occupancy of A, who has no land, and to extension by B, who has a fraction adjacent. It is like *treasure trove*. The land must be appropriated before it can become the private property of any one. The modes of doing this are different, but alike exclusive when carried out.

The language of the 5th sec. of the act of 1841-2, (see page 40 pamphlet,) is, "that all persons entitled to any of the vacant and unappropriated land south and west of the Congressional reservation line, as occupant or pre-emption rights, by this or any former acts of the legislature, shall have the preference and priority of entry for the whole term of four years," &c. Under this section it is, that complainants claim.

Then are they entitled? Have they occupant or pre-emption rights? Do they belong to the class of persons that shall enjoy the dispensation of four years? That they do not, seems manifest from the language and provisions of the 28th section of the same act, which provides, "that in all cases where the real or colorable owner of any small tract of land, held by deed, grant or entry, may heretofore have had, or may hereafter have an extension run out and attached to the same, under the occupant laws of this State, which extension, at the time it was or shall be made, did, or shall interfere with the land intended to be appropriated by any *bona fide* resident settler upon the adjoining vacant land, who was living on the same at the time such extension was made, &c., such extension shall not prevent such settler from having his claims surveyed, as he origi-

[Thacker vs. Chambers et al.]

ject the lot of land mentioned in the bill to the satisfaction of complainant's claim against Chambers, and to divest the legal title to the lot out of the other defendants.

The lot in question was sold by the Commissioners of Manchester to Joseph Hickerson, who sold to Chambers, to whom, by Hickerson's directions, the Commissioners made a deed. Chambers sold the lot by verbal agreement to Williams, who paid therefor, and went into possession; Chambers then left the country, without having the deed to himself registered, and without making Williams a deed. Williams filed his bill against Chambers, Hickerson and the Commissioners, and obtained a decree, vesting in himself the title to the lot in question, which decree has been registered in Coffee county, where the land lies.

This decree is relied on here, to show that the title to the lot is not in the complainant's debtor, Chambers, and that there was nothing to attach. The Chancellor dismissed the bill, and we think correctly. The defendant Williams has paid Chambers for the land, and has a legal title, and as complainant, the creditor of Chambers, could only be entitled to such property as Chambers had in the premises, he has no right to seize this land as the property of Chambers.

But it is insisted, that Williams did not have such evidence of his purchase from Chambers as would authorize the decree in his favor. That may be very true, but it is a matter that cannot be enquired into in this suit.

The court had jurisdiction of the cause, and having made a decree, vesting the title in the defendant, Williams, it is not competent in this collateral proceeding between other parties to investigate the grounds of proof, upon which the court acted.

Affirm the decree.

BRITAIN *vs.* COWEN.

1. The jurisdiction of the Chancery Court, to decree a sale of the real estate of a deceased person for the satisfaction of his debts, will not be defeated on the ground, that the bill is not filed in the Chancery district in which the land lies, if the court have jurisdiction on general chancery principles, independent of the special jurisdiction conferred by the statute on the ground of the location of the lands.
2. A decree against an heir, who was a minor, for the sale of lands, for the satisfaction of debts of deceased, is not void on the ground, that the heir was not served personally with process; it is sufficient if he be made a party by the bill and service of process and copy on the regular guardian.

This is an action of ejectment, instituted in the Circuit Court of Bedford county, by Britain against Cowen, for the recovery of a tract of twenty-two acres of land, lying in Bedford county.

The defendant pleaded not guilty, and the case was tried by Judge S. Anderson, at the December term, of the Circuit Court, held for Bedford county in 1844, when a verdict and judgment were rendered in favor of the defendant, from which plaintiff appealed.

All the material facts of the case are stated in the opinion of the court.

Meigs and Wisener, for Britain.

Fogg, E. H. Ewing and Davidson, for Cowen.

REESE, J. delivered the opinion of the court.

This action is brought to recover the tract of land in the pleadings mentioned, claimed by the lessor of the plaintiff, as heir and devisee of one James Britain, deceased. The defendant claims the same tract, under the decree of the Chancery Court at Franklin, subjecting the same, upon a creditor's bill, to sale for the payment and satisfaction of the debts of the testator, James Britain. If that decree be valid, or if it be not void as against the lessor of the plaintiff, then he has no right whatever to recover in this action. It is contended on his behalf, that it is void, and this upon three grounds:

1st. The want of jurisdiction in the Court of Chancery over the subject matter of the cause.

[Patterson et al. vs. McCutchen et al.]

right is conferred, so far from being bettered, he is really in a worse condition than the rest of mankind.

And the fact, that the petitioners had not designated their rights of pre-emption upon the plan, can make no difference. The 11th section of the act of 1839-40, p. 145, expressly prohibits any general enterer from intermeddling with any such right, though not laid upon the plan. And it is clear this section embraces the right of extension, for it uses the words "enlarged according to the provisions of this act," &c.

These entries, however, were made under the act of 1841-2, ch. 34, p. 39. Under this act the offices of entry-takers, &c., were opened 1st July, 1842, and the 5th section gives to all persons entitled to any of the lands "as occupant or pre-emption rights, by this or any former acts of the State, the preference or priority of entry for four years from the opening of said land offices," &c.

Now, these general terms would of themselves include all prior "occupant or pre-emption rights," however created, whether by extension, actual settlement, or otherwise. But the 28th, 29th and 30th sections of the act, in express words, refer to and recognize the right of extension as an occupant or pre-emption right. And the 5th section does not require any designation on the plan. But the 7th section expressly gives the period of two years from the passage of the act (11th January, 1842,) to designate the claim upon the plan, &c.

3. The only remaining question is, did the petitioners have a right to make two entries, or as many as they pleased, until they enlarged their 35 acres of deeded land to 200 acres? I contend they did. The right to enlarge simply of itself, expressed in general terms, would give such power, unless the right were restricted to one entry only. It would *ex vi termini* include all the usual means of attaining the end. He has a right to enter until he has 200 acres. How can this be done in many cases, unless he is allowed more entries than one?

But the 8th section of the act of 1837-8, p. 3, says, the occupant may "enter the same, or any part thereof," &c. And the 2d section of the act of 1839-40, p. 144, says, "that where any person is now, or may hereafter become the owner by deed,

[Patterson et als. vs. McCutchen et als.]

grant, entry, or occupant reservation, of a less quantity than 200 acres, the owner thereof may enlarge the same to any quantity, not exceeding 200 acres." And the 5th section of the act of 1841-2, p. 40, says, "may enter their claims or any part thereof." And the 27th and 29th sections show, that rights of occupancy might in future be created, which did not then exist.

Now, I contend that these acts do, in express words, authorize more entries than one. If these heirs had only entered 15 acres, their right to this would be clear. They then would only be the owners of 50 acres, with 15 acres still of vacant land. And why could they not enter it also? Could they not continue to enter, as they were able from time to time, until the whole right were satisfied? Who would be prejudiced by this? Not the State, nor its officers. Besides, the case of *Davis vs. Broomfield*, 3 Hump. Rep. 174, is authority to show, that an occupant may secure his rights by several entries.

TURLEY, J. delivered the following opinion of the court.

The facts of this case, as the same appear from the case agreed, and the petition which is made a part thereof, are, that John D McCutchen, James P. McCutchen, Andrew McCutchen, and Wm. C. McCutchen, were the owners of thirty-five acres of land, in the county of Giles, south and west of the Congressional line, in fee simple, that there were two small portions of vacant land, of 15 acres each, adjoining the same, but on different sides thereof; that they on the 31st day of July, 1843, filed in the entry-taker's office of Giles county, entries accompanied with the proper affidavits, and twelve and one-half cents per acre, the legal price for the entries, but which were refused by the entry-taker, because one John G. Morris had previously, to wit, on the 3d day of July, 1843, entered the same lands, as general enterer, under the provisions of the act of 1842, ch. 34. And the question now is, whether these entries are good and available in law against those proposed to be made by the McCutchens, as an extension of their thirty-five acre tract, and involves the question, as to what extent

[Patterson et als. vs. McCutchen et als.]

occupants and owners, of a less quantity of land than two hundred acres, are protected against general enterers, and entitled to preference over them. By the provisions of the 5th section of the act of 1842, ch. 34, "All persons entitled to any of the vacant and unappropriated lands, south and west of the Congressional reservation line, as occupant or pre-emption rights, by this or any of the former acts of the legislature of this State shall have the preference and priority of entry for the whole space of four years from the opening of said land office, and may at any time within the term of four years, enter their claims, or any part thereof, by paying to the entry-taker twelve and one-half cents per acre, which shall be received in such currency, as is by law received in payment of taxes."

By the provisions of the second section, the land offices for the reception of entries under the act, are directed to be opened on the 1st day of July ensuing its passage, viz, 1st July, 1843. The entries of the petitioners were therefore tendered within due time, if they are protected by the provisions of the statute against general entries. We have seen that the statute protects all occupant or pre-emption rights, whether guarantied by that or any other statute, against the general enterer for four years.

By the provisions of the 2d section of the act of 1840, ch. 62, "All persons who were then, or might thereafter become the owner by deed, grant, entry, or occupant reservation, of a less quantity than two hundred acres of land, are authorized to enlarge the same to two hundred acres."

That this right of extension, is a right of pre-emption, cannot be denied, for (to test the word pre-emption by its derivation) it means a right of previous purchase—being derived from the latin word *pre-emptio*, a previous purchase. This pre-emption right of the petitioners is clearly protected by the words of the statute of 1842, for the space of four years from the date of its passage; and they having tendered their entries for the land in dispute, with the formalities required, the same should have been received by the entry-taker, notwithstanding the previous entry by a general enterer, his entry being void, under the provisions of the statute, as having been made at too early a period.

[*Barker vs. Wheelip.*]

We, therefore, affirm the judgment of the Circuit Court, making the *mandamus* upon the entry-taker, at the prayer of the petitioners, peremptory.

BARKER vs. WHEELIP.

Horses were conveyed by deed of trust, and described in the following language: "Twenty-five head of horses:" Held, that this description was sufficiently specific to be valid; and that parol proof was admissible to identify them.

This is an action of trover, which was tried on the plea of not guilty by Judge Martin and a jury of Montgomery county, and a verdict and judgment rendered for the defendant, from which the plaintiff appealed.

Shackleford, for Barker, cited and commented on the following authorities: Angel on Assignments; 5 Mass. 42; *Galt vs. Dibrell*, 10 Yerg.; 12 Serg. & R. 189; Shepard's T. 433; Greanleaf Ev. 324.

Boyd and Kemble, for Wheelip.

TURLEY, J. delivered the opinion of the court.

The question for consideration arises upon the construction of a deed of trust. C. M. Barker, on the 12th day of February, 1824, conveyed certain property, consisting of negroes, horses, mules, hogs, cattle, in trust to secure the payment of debts due by him to the plaintiff. Four of the horses, which are claimed to be thus conveyed, were afterwards found in the possession of the defendant, and this action of trover brought for them. Upon the trial the deed of trust was read in evidence, and parol proof offered, to show that the horses sued for were a part of those sold, but this proof was rejected, and the question is, was this testimony properly rejected? It is argued that it was, because the description of the horses in the deed of trust is too

[Barker vs. Wheelip.]

uncertain to identify them, and that parol proof could not be heard for that purpose.

The deed of trust reads as follows: "Doth by these presents, grant, bargain, sell and convey to the said E. M. Barker, ex'r, &c., the following described slaves, viz, fifteen negroes, named as follows: Tom, Morgan, Willis, &c.; also the following described stock: about 25 head of horses, 6 mules, 150 head of sheep, 40 head of cattle, including oxen, and 200 head of hogs." The proof offered in explanation, and excluded by the court, was to the effect, that C. M. Barker had at the time of the execution of the deed but seventeen horses, and that these four were a portion of them.

How the description of the horses, and other stock conveyed, could well have been more specific, we do not perceive. Would the calling them by name, or a description by color or age, have given a more definite idea of what particular horses were designed to be conveyed, than the description by number? We think not. The design obviously was to convey all the horses he had in possession, and parol proof must always become necessary in such cases, and we are aware of no principle of law forbidding its reception; to refuse it, must invariably defeat sales of personal property of this kind, when it is not delivered at the time of the sale, as it will be found impracticable to give such description of it as to obviate the necessity of introducing parol proof, to show that the property sued for is the same that was conveyed. The description by number in this case, we think good.

Reverse the judgment, and remand the case for a new trial.

TAYLOR vs. HARWELL *et als.*

A complainant will not be permitted to question the right of judgment creditors to sell the debtors estate, where it appears that complainant's claim originated in fraud.

Wright and Fogg, for complainant.

Brown, Rose and Jones, for defendants.

TURLEY, J. delivered the opinion of the court.

This bill is filed by the complainant, to enjoin the defendants from enforcing judgments at law, obtained by them against Wm. Ament, by the sale of certain negroes, claimed to have been bought by one John W. McDaniel from said Ament, and bequeathed by him to the complainant. The deed from Ament to McDaniel is attacked for fraud; they insisting that it was merely colorable, and made of purpose, to hinder and delay the creditors of said Ament in the collection of their just debts. And of the truth of this proposition, the court has no doubt whatever: the proof most abundantly sustains the charge, and to enter into an argument to prove it, would be not only useless but preposterous. But it is attempted on the part of the complainant, to get rid of this difficulty, by attacking the rights of the defendants to subject this property to their executions upon two grounds.

1st. That if they are creditors of Ament, that he having taken the benefit of the act of bankruptcy, can have no effects liable to their executions, their debts having been due before he obtained his discharge.

2d. That the executions of some of the defendants were *functus officio* before levy, and therefore created no lien upon the property.

Out of these two objections to the defendants' claims, several questions of law, of much difficulty and perplexity, have arisen, but we are not only freed from the necessity of determining them here, but believe it would not be proper to do so, because the complainant's right having originated in a gross and palpable fraud, she must be repelled from a Court of Chan-

[Stevenson vs. McLean et al.]

cery, which will never lend its aid to enforce or protect claims so originating; and because there is no cross bill on the part of the defendants, asking that the cloud which rests upon them, by reason of the fraudulent deed of conveyance, be removed.

We, therefore, dissolve the injunction, heretofore granted in this case, dismiss the bill of the complainant, and leave the parties to their appropriate remedies at law.

STEVENSON vs. McLEAN et al.

A Sheriff is not bound to execute void process—he is bound to execute process merely irregular and voidable, and if he fail to do so, he is liable to the plaintiff, and if he execute it, he is protected.

This is a motion against a Sheriff of Coffee county and his sureties, in the Circuit Court of said county, for making an illegal return of an execution. The case was tried by judge Marchbanks, and a judgment rendered for the defendants, from which the plaintiff appealed.

The facts are all stated in the opinion of the court.

Green and Reid, for plaintiff.

Hickerson, for defendants.

REESE, J. delivered the opinion of the court.

V. K. Stevenson, for the use of Wm. A. Cook, obtained a judgment against Isaac H. Roberts, before a justice of Franklin county, for the sum of one hundred and five dollars and ninety-five cents and costs. Upon this judgment, Wm. Reeves, a Justice of the Peace of that county, issued an execution, tested of that county, and reciting that a former execution had been issued upon the judgment by Justice Robinson, before whom the judgment had been rendered, and had been returned not satisfied, and nothing found; and the said first mentioned exe-

[Stevenson vs. McLean et al.]

cution goes on to command any lawful officer to execute and return the process; setting out the judgment, &c., dated 9th Nov. 1842. On the same day A. G. Anderson made oath before Justice Reeves, that no part of this execution was satisfied. To this was appended the following certificate:

"I do certify, that James Robinson, at the time mentioned, when the judgment and executions were rendered against I. H. Roberts, was an acting Justice of the Peace for my county. I do further certify, that Wm. Reeves, whose name is signed to the above execution, is, and was at the date of the same, an acting Justice of the Peace, for my county. This 8th of November, 1842.

"ISAAC ESTILL, *Clerk.*"

Upon the 27th day of February, 1843, Michael Shores, a Justice of the Peace for Coffee county, issued an execution, tested of that county, reciting an execution, issued by James Robinson, a Justice of Franklin county, against Isaac H. Roberts, to satisfy a judgment against said Roberts, in favor of V. K. Stevenson, rendered on, &c., and reciting the return thereon, and reciting an *alias* issued by the said James Robinson, and the return thereon, and further reciting that a transcript of said execution was certified according to law, and was then on file in his office. The execution proceeds in the usual manner and form, to command the officer to make the money, &c.

This execution came to the hands of the Sheriff of Coffee county, and he returned thereon, that he had levied it on one negro boy, named Aaron, about five years old. 15th March, 1843. And adds, "not satisfied, March 27th, 1843.

"D. McLEAN, *Sheriff.*"

On the 5th day of April, 1843, the same Justice issued an *alias* execution commanding the officer, as before he had done, to satisfy a judgment that V. K. Stevenson had obtained against said Roberts, before James Robinson, a Justice of the Peace for Franklin county, on the 20th of September, 1839, on which judgment, execution was issued and certified to Coffee county, and was on file then in his office, commanding him to make the same, &c. On the 5th day of May, 1843, the Sheriff D. McLean, made this return only, "Not satisfied." For the illegal

[*Stevenson vs. McLean et al.*]

return upon the last execution, V. K. Stevenson moved the Circuit Court of Coffee county for judgment against the Sheriff and his sureties; and he proved the due service upon the Sheriff of a proper notice of the motion, and the Sheriff appeared and made his defence. Plaintiff also produced a copy of the Sheriff's official bond, duly authenticated. The Circuit Court adjudged, that the plaintiff should take nothing by his motion, and adjudged against him costs, &c. He has filed his writ of error in this court. Proceedings more erroneous and voidable than those on the part of the plaintiff, cannot be readily imagined.

The judgment before Justice Robinson, in Franklin county, was in the name of V. K. Stevenson, for the use of Wm. A. Cook, and the Franklin county executions pursue the judgment, but the Coffee county executions speak not of "the use of Wm. A. Cook." The executions certified from Franklin county, were issued by Justice Reeves, reciting a previous execution by Justice Robinson, but the first execution issued in Coffee recites, that the certified transcript of the executions from Franklin were issued by Justice Robinson. Again: the certificate of Isaac Estill, is signed indeed, "Clerk," but of what court, or county, the certificate does not import. He says Robinson and Reeves were acting Justices of his county, but does not tell us of what county that is.

If irregular, defective and erroneous process, in the hands of an officer, can justify the officer for an illegal return, then this officer is well justified. But the irregularity of process, and its erroneous and voidable character, will neither prevent an officer from protecting himself by it, nor justify him in omitting to do his duty in its execution. Watson, on the official duty of Sheriffs, says, that when a writ is delivered to him, he is bound to execute it according to the exigency thereof, without enquiring into the regularity of the proceeding whereon that writ is grounded, and although it be voidable and erroneous, such writ is sufficient justification for him, for he is a ministerial officer, and he is not to examine the legality of process. But a sheriff in executing process, when there is a total want of jurisdiction in the court over the cause, would be a trespasser.

[*Ross et al. vs. Planters' Bank.*]

If a *ca. sa.* be taken out, after the year, without a *sci. fa.*, and the defendant be arrēsted and suffered to escape, the sheriff will be liable. Watson 39. This is sufficient to make the distinction, on which we proceed, manifest.

None of the defects and irregularities in the case before us, made the process in the hands of the sheriff void; it is clear that it was voidable only. The sheriff is, therefore, liable on the motion of the plaintiff, and judgment must be given against the sheriff and his sureties accordingly.

ROSS *et al.* vs. PLANTERS' BANK.

1. Where the notary made a mistake as to the date of the note in the notice furnished to the endorser, such mistake may be corrected by proof on trial.
2. The fact of the delivery of a notice to an endorser, like other facts, may be inferred by circumstances, and the taking an indemnity after protest, is a circumstance going to sustain such fact, and admissible evidence.

This is an action of assumpsit, which was tried by Judge Martin, and a jury of Montgomery county, at the November term, 1844, and a verdict and judgment rendered for the plaintiffs, from which the defendant appealed.

Boyd, for plaintiffs in error.

Fogg and Kemble, for the Bank.

REBESE, J. delivered the opinion of the court.

The plaintiffs in error, were sued as the makers and endorsers of a promissory note, of which the defendant in error is the holder. Several objections are taken here to the proceedings in the court below:

1st. That the Notary was permitted to prove, that on the copy of the note, on the back of the protest, he made a mistake of the date, dating it in the copy on 22d November, 1844, (which had not yet arrived—a date impossible to be true,) instead of

[Ross et al. vs. Planters' Bank.]

22d November, 1843. His entry of the protest, read by him to the jury, had the correct date of the note, being the same as that of the note sued on. Similar corrections of the notarial record, furnished as notice to the parties, have been often allowed, and are sanctioned by many authorities referred to in the argument. The court in such cases, taking care to leave the question properly to the jury, as to the identity of the instrument mentioned in the notice with that sued on, and as to whether the parties, notwithstanding such mistake, had substantial notice as to what security it was intended to fix their liability by the notarial protest actually furnished them.

As to Ross, an endorser, the proof was, that one Johnson, a messenger, on the proper day, gave the notice and protest to a boy at a school-house where Ross was teacher, and directed the boy to give it to Ross; that the boy took the paper and went into the school-house; and afterwards, Johnson asked Ross which of the boys it was, who gave him the paper? Ross said it was not his province to speak on the subject. This would seem satisfactory evidence of the notice to be left to the jury. But after the commencement of the suit, and before the trial, Barker & Co., the makers, made a deed of assignment in trust, among other things, to indemnify Ross as endorser on this very note, and Ross attended to the proof and registration of the deed. This deed, and these facts were given in evidence. And that is objected to. The evidence was competent, and tended to show that Ross knew, or believed, that his liability was fixed by the reception of the notice.

Upon the whole, this is a very clear case for the affirmation of the judgment below.

MAYBERRY vs. NEELY et als.

1. Slaves conveyed in trust to Thomas and his wife Elizabeth during their joint lives, are subject to the debts of the husband during his life.
2. Where property is conveyed in trust for the benefit of the wife, it enures to the benefit of the husband, unless it be conveyed to the sole and exclusive use of the wife by express words.

This is a bill which was filed in the Chancery Court at Franklin by Mayberry against Neely and wife and others, seeking to subject certain property to the satisfaction of certain judgments which he had recovered against them. The material facts in relation to which are stated in the opinion of the court.

The presiding Chancellor dismissed the bill. The complainant appealed.

Marshall, for complainant.

See 2 Story's Equity, sec. 1383.

D. Campbell and *E. H. Ewing*, for defendants.

See 1 Leigh, 443; 8 Yerger, 35; 4 Leigh, 550; 5 Munford, 86.

REESE, J. delivered the opinion of the court.

Mayberry obtained judgments before a justice, against Neely and wife, upon bills single made by them, and he sued them and one Lee in the Circuit Court, upon a bill single made by them, and obtained a judgment against Neely and the said Lee, the wife of said Neely in said suit being discharged upon the plea of coverture. Upon these judgments executions were issued, and returned *nulla bona*. This bill is filed to subject to the satisfaction of said judgments certain negro slaves, conveyed by Neely in a post-nuptial deed to Andrew Campbell, upon certain trusts for the benefit of himself and wife.

The complainant seeks to obtain a decree upon three grounds.

1st. That the conveyance was fraudulent against creditors. This he has failed to make out by proof. He was not a creditor at the time of the conveyance, and it seems moreover to have been made fairly, and with no purpose to defraud creditors.

[Mayberry vs. Neely et als.]

2nd. Upon the ground, that if a wife had a separate property in the negroes, that separate property was bound by her being a party to the bills single. But she became a party to them as a surety for Lee and for her husband, and for no beneficial object or contract of her own, and on the ground of coverture, therefore is not liable either in a court of law or in a court of equity.

But the complainant insists, in the third place, that by the proper construction of the limitations and trusts of the post-nuptial deed, the husband has an interest which he is entitled to subject in equity to the satisfaction of his judgment. This will depend upon the terms and meaning of the deed itself. The trust in the said deed is, "That the said Andrew Campbell shall hold said property for the use and benefit of the said Thomas and the said Elizabeth Neely during their joint lives, and suffer them to use and enjoy the same: and if the said Thomas shall survive the said Elizabeth, then the said Andrew Campbell shall hold said property for the use and benefit of the said Thomas during his natural life, and suffer him to use and enjoy the same; and at his death shall convey the same to the next of kin of the said Elizabeth, who shall be capable of taking said Elizabeth's property, by the law of distribution of this State, as if she had then died sole owner thereof, and in the same proportions; and if the said Elizabeth shall survive the said Thomas, then the said Andrew Campbell shall, at the death of the said Thomas, convey to the said Elizabeth," &c. The object and purpose, and the legal effect of this instrument, are most clearly not to convey any sole and separate interest in the property to the wife during the life of her husband, but to the wife, or her personal representatives. This is the whole object and the whole operation of the instrument.

It is argued, that if the husband were to sell the property for the term of his life, or if it were sold by operation of law for the payment of his debts, the wife would be deprived of her joint use and benefit in the property during their joint lives, contrary to the terms of the deed. But how does this appear? It may be for the use and benefit of the wife, that the husband should sell the property for his life; she may in that way bene-

[*Mayberry vs. Neely et al.*]

ficially enjoy the property in the proceeds of it; and if it be sold for the payment of his debts, it does not follow that such result may not be a very great benefit to the wife, and the best use for her of the property. If the instrument had not mentioned the husband at all, and had conveyed the property for the use and benefit of the wife, it would have enured, on well settled principles, to the benefit of the husband, and been liable to the satisfaction of his debts, unless in the instrument there had been superadded words importing that the property was intended to be for the sole and separate use and benefit of the wife, exclusively of her husband: and *a fortiori* in this case, where the instrument expressly conveys the property in trust for the joint benefit and use of the husband and wife.

We have been referred, on the part of defendants, to the case of *Hughes vs. Pledge and others*, 1 Leigh's Rep. 443. That was a marriage settlement case. It is very briefly disposed of by the court, and, whether correctly or not, it differs from this materially. The settlement was of slaves to the use of husband and wife during their joint lives; remainder to wife, if she survives; remainder to whomsoever the wife shall appoint, if she dies before the husband; remainder, in default of such appointment, to husband for life, and after, to offspring of the marriage, to the intent that the property shall not be subject to the disposal, debts, contracts or engagements of husband."

These latter words may sustain the judgment of the court, that during the life of the wife the property was not liable to the husband's debt.

The decree will be reversed, and so many of the slaves as may be necessary to satisfy complainant's judgments will be sold by the Clerk and Master for and during the life of the husband, the Clerk and Master taking from the purchaser or purchasers bonds with good sureties that the slaves shall be forthcoming at the death of the husband, and that in the meantime they shall not be taken beyond the limits of this State.

TAYLOR & BLACKMORE vs. WHITTHORN.

1. A judgment by confession is not void because it was confessed only ten days before the filing a petition by defendant to be declared a bankrupt. It must have been confessed in contemplation of bankruptcy, voluntarily, and with the view of giving a particular creditor a preference over the general creditors.
2. Where a defendant confessed judgment after suit instituted and stipulated for delay, the confession, under such circumstances and stipulation for delay, repel the conclusion that such confession was voluntary or made with a view to prefer such creditor.

This is an action of ejectment instituted in the Circuit Court of Bedford county, for the recovery of eighty acres of land lying in said county. It was instituted by Whitthorn, the purchaser of the land at the sale of a bankrupt's effects, against Blackmore, the purchaser from the bankrupt, and involved the validity of a judgment which was confessed by the bankrupt some ten days before the filing of his petition in bankruptcy.

The case was tried on the plea of not guilty, and verdict and judgment rendered in favor of the plaintiff. The defendant appealed. The facts as set forth in the agreed case are stated in the opinion of the court.

E. Cooper, for plaintiff in error.

He cited Owen on Bankruptcy, 103, 104, 113; 5 John. Rep. 412; 5 Barnw. & A. 289; 6 East, 80.

Wisener, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

The question presented for the consideration of the court in this case is, as to the validity of a judgment under which John A. Blackmore, the defendant in ejectment, claims the premises in dispute. It appears, from a case agreed, between the parties, that the tract of land sued for had belonged to one Charles Coats; that he and Jonathan Cooper, Wilson Turrentine and John A. Blackmore, one of the defendants, had been sued to the April term, 1842, of the Circuit Court of Bedford county, by Davidson, Coldwell & Co. upon a bill of exchange for about the sum of \$400, of which Cooper was the acceptor,

[Taylor & Blackmore vs. Whitthorn.]

Coats the second endorser, Blackmore the third, and Turrentine the fourth; that at the same term a judgment was confessed by the defendants in favor of the plaintiff for the amount due on the bill, and execution thereon stayed by agreement between the parties, for one term; that after the expiration of the time thus given, an execution was issued upon the judgment and levied upon the land, which was sold, and purchased by the defendant Blackmore; that about ten days after the confession of judgment, said Charles Coats filed his petition in the United States District Court at Nashville for the purpose of being declared a bankrupt; that some time in May, 1842, he was so declared; that in his schedule as first rendered, the tract of land was not inserted, but that subsequently the creditors of Coats, of whom Blackmore was one, caused it to be inserted, and thereupon the same was sold by the assignée and purchased by the plaintiff in ejectment, William I. Whitthorn; deeds of conveyance were duly executed by the sheriff under the execution sale to the defendant Blackmore, and by the assignee under the commission of bankruptcy to the plaintiff Whitthorn, which are properly proved and registered.

Now, if the judgment confessed at the April term, 1842, by Charles Coats in favor of Davidson, Coldwell & Co. be void, under the provisions of the bankrupt act passed by the Congress of the United States, and approved by the President on 19th August, 1841, then the plaintiff in ejectment is entitled to recover the possession of the premises, otherwise not. The 2nd section of the act provides, "That all future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, or for the purposes of giving any creditor, endorser, security, or other person, any preference or priority over the general creditors of said bankrupt, and all other payments, or securities, or transfers of property, agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatsoever, not being a *bona fide* creditor, or purchaser for valuable consideration without notice, shall be deemed utterly void, and a fraud upon this act."

In the construction of this section, it has been considered,

[Taylor & Blackmore vs. Whitthorn.]

that to render such payments, securities, conveyances or transfers of property void, they must have been made or given in contemplation of bankruptcy and for the purpose of giving the particular creditor or creditors a preference or priority over general creditors. Owen on Bankruptcy, 103. It is difficult to say, from the facts in this case, that such were the designs of Coats in confessing the judgment in favor of Davidson, Coldwell & Co. There is nothing in the case from which they can be inferred, but a short lapse of time intervening between the date of the judgment and the application to be declared a bankrupt: the debt was honestly due, and suit was pending upon it.

In the work above quoted, page 104, it is said, if a payment be made under a fear of arrest, or of proceedings being commenced to recover the same, (though the fear be groundless,) or if it take place under such circumstances as will overcome the free will of the debtor at the time, the payment will be good, and the assignees will not be able to recover it from the creditors. Thus, when a creditor wrote to his debtor, saying, I must have the money in a few weeks, or I will put the claims in the hands of an attorney; and the debtor, in consequence of his threat, paid the debt in three weeks, the payment was not considered a voluntary payment.

In the case of *Morgan et als. assignees of Shirley, vs. Bondurant*, 5 B. & A. 289, it was held by Littledale, Park and Patterson, Judges, "that such payment, preferences or securities must be made voluntarily and in contemplation of bankruptcy before they can be held void." Patterson observed emphatically, "I think it ought to have appeared clearly that the bankrupt took the first step towards making the deposit, (which was the security in that case.) Now there is much evidence, that he had been frequently asked for payment or security."

If, then, a debtor is warranted in paying or securing a debt, when induced so to do by the threats and importunities of his creditor, and if such payment ceases to be voluntary under such circumstances, *a fortiori* would it be so where a suit is actually pending for its recovery, as in the case under consideration: if he might have paid the debt without its being a fraud upon the bankrupt act, surely he might confess a judgment.

[Trigg vs. Faris.]

The fact, that an execution upon the judgment was stayed for four months, cannot vitiate the transaction; on the contrary, it tends strongly to show that the judgment was not confessed voluntarily and in contemplation of bankruptcy, for the purpose of giving that particular creditor a preference over all others; for if it had been, the debtor would not have stipulated for delay, but would have permitted an execution to issue forthwith.

We are therefore of opinion, that the judgment is not void, and that the defendant Blackmore has acquired the legal title to the premises by virtue of his purchase under it, and the conveyance from the sheriff; and do therefore reverse the judgment of the Circuit Court, and give judgment upon the case agreed for the defendant in ejectment.

TRIGG vs. FARIS.

In the sale of all chattels, a warranty of title is raised by implication of law, and this implication is not excluded where the sale is by deed without warranty.

This is an action of assumpsit, which was tried by Judge Marchbanks and a jury of Franklin county, on the plea of non-assumpsit; and the Judge charged the jury, that in a sale of chattels the rule of law that a warranty of title was implied was applicable only to parol contracts. A verdict and judgment were rendered in favor of the defendant, from which the plaintiff appealed.

Taul, for the plaintiff, cited Chitty on Contracts, 133; 2 Blackstone, 451; 2 Comyn on Con. 273; Salkeld, 210; 1 Lord Raym. 593; 2 Marsh, 217; 2 Starkie, 903; 9 Yerger, 184.

H. L. Turney and *Venable*, for defendant.

REESE, J. delivered the opinion of the court.

The defendant was in possession of a negro slave, and sold the same to plaintiff, and by deed transferred the slave to the

[Trigg vs. Paris.]

plaintiff. This deed contained no covenant whatever, but was a mere conveyance of the title. This action of assumpsit was brought upon the warranty of title implied by law from the mere fact of the sale; the defendant not having a good title to the slave, who was taken from the possession of the plaintiff and sold, by the paramount right of another. Upon the trial of the cause, the honorable Circuit Judge charged the jury, "that the plaintiff could not recover, because of the deed or bill of sale; that the writing must contain the whole contract, and to permit the plaintiff to recover would be to add to or enlarge the written agreement."

In this charge, we are of opinion that the Circuit Court was in error. It is a well settled principle, applicable to all sales of chattels in the possession of the vendor, that the act, or fact of sale, of itself, by operation of law, implies and involves a warranty of the title. This principle operates with as much force when the sale and transfer of the property is evidenced by writing, or by deed, as if the evidence of sale were merely verbal. And this principle does not contravene the general rule of evidence, alluded to by the Judge; because the warranty of his title is as strongly implied from the fact of sale, which fact is proved by deed, as if it were proved otherwise. It does not enlarge the writing: it arises by operation of law, from the act, or fact of sale itself. The property being a slave, makes no difference in the principle: a slave is a personal chattel.

This point has been often decided, and was expressly determined at this term, in the case of *Gookin vs. Campbell et als.*

The verdict is set aside, and a new trial is awarded.

SAUNDERS et al. vs. HARRIS et als.

1. Where it appears that an original deed is in the possession of the party, such party cannot give in evidence a copy.
2. Copies of deeds from the registry books of States where no probate was necessary before registration, are not admissible evidence of the validity of such deeds.
3. Where a joint judgment and joint verdict have been rendered against defendants, and there is no evidence to sustain the verdict as to one, the verdict must be set aside and judgment must be reversed as to both.

This is an action of detinue for the recovery of certain slaves, instituted in the Circuit Court of Robertson county. The case was tried by Judge Martin and a jury at the June term, 1844. The claim of the plaintiff Harris and others was founded on a bill of sale alledged to have been executed by Charles Gant in 1816, and registered in Georgia, by which the negroes were conveyed to Amity Harris, the mother of the plaintiff, after the death of Charles Gant during her life, and after her death to her children. After the death of Gant and A. Harris this suit was instituted against the defendants, one of whom had in possession the slaves in controversy.

The plaintiffs introduced as evidence a copy of the alledged bill of sale. This was objected to, and the objection overruled and the copy read:

A joint verdict and judgment were rendered against Huges and Saunders. They appealed.

A. Ewing and Lowe, for plaintiffs in error. They cited Statutes of Ga. 108, 148; 11 Wheaton, 79; Ry. and Mo. 339.

Boyd and Pepper, for defendants in error.

REESE, J. delivered the opinion of the court.

The plaintiff in error, with others, was sued by the defendants in error, in an action of detinue for negro slaves, and verdict and judgment were rendered against them, to reverse which they have prosecuted their appeal in error to this court. To this reversal, we think they are entitled upon two grounds.

First: The court erred in receiving as evidence of the plain-

[Saunders et al. vs. Harris et als.]

tiff's title the copy of the bill of sale registered in Georgia. The court erred in this respect, because, first, it appears from the record in this case that the original bill of sale was, during the sitting of the court, upon the trial, in the power and possession of the plaintiffs below; and, secondly, because the copy from the registry books of Georgia contains no probate or acknowledgment of the deed; none, in point of fact, having taken place, or being in 1816 required by the law of Georgia to have taken place in order to registration; the system of registration of that State at the time being intended to give notice merely of the existence of such instruments, not to create and perpetuate record evidence of their execution and validity, which could supply in any event the want of an original. The copy read in the Circuit Court, in this case, could not have been read in a judicial proceeding in Georgia, where the fact of a valid execution of the instrument was in question, because it was not registered, or required to be registered, upon any probate whatever. The clause of our registration act of 1839, relied on to justify the reception of the instrument by the Circuit Court, if it applies to registration without the State of Tennessee at all, cannot be held to apply to registration in a State whose laws required no probate whatever in order to registration, the pervading principle of our whole registration system being to prove and perpetuate a valid execution of instruments, as well as to give notice of their existence.

Second: The second ground for reversal is, that there is in the record no evidence to sustain the verdict against Halloway Huges as having detained or been possessed of any of the negro slaves sued for by the plaintiffs below; which fact, as the verdict and judgment are joint, must set aside such verdict, and reverse such judgment as to both. Let this be done and a new trial awarded.

TURNER vs. GRAINGER *et al.*

1. The mere fact that a father puts his child in possession of a slave, will not give him a title in three years by the statute of limitations. The child is a bailee, and her possession is not adverse.
2. Where a parol and void gift of a slave is made, the statute commences running from the date of the gift, because the possession is adversely held.

This is a bill which was filed in the Chancery Court at Galatin, by Turner against Grainger & Roney. The case came on for hearing on bill, answers, replication and proof, before Chancellor Cahal, at the June term, 1844. He dismissed the bill. Complainant appealed.

Guild, for complainant.

Baldrige, for defendants.

REESE, J. delivered the opinion of the court.

The complainant is a judgment creditor of William Roney the defendant, and caused an execution to be issued to obtain satisfaction of said judgment, upon which there was a return of *nulla bona*. It seems, that in the year 1836 the defendant Roney intermarried with the daughter of defendant Grainger; and some time after the intermarriage, the father-in-law placed a negro girl slave in the possession of the son-in-law; but the answer of the former to the bill, states that he made no gift of the slave, either written or verbal. The proof, however, makes out, that a little before the time when Roney came into the possession of the slave, Grainger sent him a message, or stated to him, that if he did not come and take possession of his negro, he would charge him for her board. Before, however, the slave had been two years in the possession of Roney, the latter agreed to hire her of Grainger, and gave to him his note for the sum stipulated for the hire, and this he continued to do for two or three years, and until Grainger sold and conveyed the slave to one Crenshaw, for the price of four hundred and fifty dollars. In this conveyance, at the request of Crenshaw, Roney joined. With the proceeds of the sale of the slave, Grainger bought a

[Turner vs. Grainger et al.]

tract of land, took the title to himself, and settled Roney and his family. The complainant files this bill to obtain satisfaction of his judgment against Grainger, upon the ground that he has funds or effects in his hands which equitably belong to Roney.

The Chancellor, upon hearing of the cause, dismissed complainant's bill, and he has appealed to this court. On the part of the complainant, it has not been contended, that the delivery of the slave, or even the alledged verbal gift, vested in Roney by their own proper force and operation, any title whatever to the slave in question. For, since our act of 1831, gifts of slaves, to be valid, must be in writing. But it is insisted, that the statute of limitations of three years vested in Roney a good title to the slave. It has been held by this court, in the cases of *McDonald vs. McDonald*, 8 Yer. 145, and *McKissick vs. McKissick*, Meigs' Rep. 434, which arose under, and were controlled by the act of North Carolina in 1806, that in pursuance to the decisions of that State, upon the construction of the act of 1806, "the mere fact that a father puts his child in possession of negroes, will not, no matter how long he retains that possession, give him a title to them by the statute of limitations. That the reason why the statute of limitations does not run in favor of such possession is, that it is not held adversely. The possessor is a mere bailee for the owner, and the possession is that of the owner." We apprehend this relation of bailment and its consequences is limited to the case put, namely, where the parent places a negro in the possession of a child, without more,—in such case the statute would commence running from the time that the bailee notified the bailor that he disclaimed his title, and held for himself. But if in addition to the delivery, there be an express gift of the property, although verbal, the possession of the donee would from the nature of the transaction be for himself exclusively, and the statute would commence running; and if the donor did not, by suit or otherwise, reclaim the property, the title, not by operation of the gift and delivery, indeed, but by the adverse possession and the statute, would be vested in the donee as against the donor and others; the verbal gift, in such case, invalid as conferring title, would yet serve to

[*Martin, adm'r. vs. Ramsey et als.*]

manifest and establish the nature and character of the donee's profession.

If in the case before us, the fact be as the defendant Grainger insists, that there was no verbal gift, then it was, as we have said, a case of simple bailment, and the statute for aught that appears, never commenced to run. If it were, as the complainant contends, a verbal gift, then the statute may have commenced running; and the question would be, whether the donee had three years' possession of the slave claiming her adversely and for himself. The proof is, that he had not such possession; but, on the contrary, after being a year or two in possession, he hired the negro of Grainger, and gave his note for the sum stipulated. But it is said this was done to cover up the property, and defraud his creditors.

The obvious answer is, that the gift constituted no title. The property was not his at all, and so could not be covered up, nor his creditors with regard to it be defrauded.

Upon the whole, then, it is very clear that the decree of the Chancellor must be affirmed, and the bill be dismissed with costs.

MARTIN, *adm'r.* vs. RAMSEY *et als.*

Where a deed of gift was found amongst the papers of a dead man, executed by him and witnessed; it is held that these facts alone would not constitute sufficient evidence of a delivery to perfect the title of donee. There must have been acts and declarations of the deceased, showing that he regarded the signature and witnessing of the deed as passing the title.

This bill was filed in the Chancery Court at Woodbury by Martin, the administrator of Butcher, deceased, against Ramsey and others, judgment creditors of Kersey. The creditors recovering judgments against Kersey, executions were issued and levied on a slave in the possession of Martin as administrator of Butcher. Martin filed this bill to restrain the sale of the slave, alledging that the slave was a portion of the property of the estate of which he was administrator.

[*Martin, adm'r. vs. Ramsey et al.*]

The creditors answered, stating that the slave was conveyed by deed of gift by Butcher in his lifetime, to his daughter Elizabeth, the wife of Kersey, and that it was Kersey's property and subject to the satisfaction of their judgments. It appeared by the proof, that the deceased signed the deed and it was tested by one witness and left amongst his papers, where it was found and taken possession of by the complainant as administrator. Butcher said, if he was forced to pay certain debts for Ramsey, the slave in controversy should pay them, if another slave deeded to Elizabeth Ramsey was not sufficient.

The case was tried by Chancellor Ridley at the March term, 1844, on bill, answer, replication and proof.

The decree shows that, the Chancellor believing that the title of complainant to the slave was not clear and indisputable, but that the slave in controversy was the property of Kersey, and as such subject to his execution creditors, the bill was dismissed.

From this decree the complainant appealed.

This case was argued by *M. M. Brien* for the complainant, and by *H. M. Burton* for the defendants.

GREEN, J. delivered the opinion of the court.

This bill is filed to restrain the sale of a negro slave, Daniel, who, the complainant alledges, is the property of the estate of his intestate, and who has been levied on at the instance of Ramsey, by the other defendants, who are constables, by virtue of executions against Henry Kersey, by virtue of which executions said slave was taken out of complainant's possession.

The answer admits the levy of the executions on Daniel, but insists that said slave belongs to Kersey, the defendant in the executions; that he was given to the daughter of the complainant's intestate, who is the wife of said Kersey, by deed, and was in the possession of said Kersey, whereby his marital rights attached. It appears from the proof, that the complainant's intestate executed a deed of gift to his daughter Elizabeth Ker-

[Martin, adm'r. vs. Ramsey et al.]

sey for Daniel and a girl named Milly, dated 27th May, 1840. This deed remained in his possession until his death, and was found among his papers. He was heard to say, after the deed was made, that if he lost a suit in which he was then engaged, as the surety of Henry Kersey, he intended the girl Milly to pay the debt, and if she would not be sufficient, Daniel should go to pay it. The deed, with other papers of the complainant's intestate, were placed in the office of the county court clerk; and being found there, was proved.

The only question is, whether this deed was ever delivered as such, or was intended by Butcher to take effect, by his act of acknowledgment before witnesses.

It is certainly true, that no formal manual delivery to the grantee is necessary to the validity of a deed. If, by his conduct and declarations, he evinced that he considered the act complete ~~when~~ he acknowledged it before subscribing witnesses, that would be sufficient to vest the title in the donee. But the mere fact, that the paper is found signed and witnessed, would not have that effect.

We think, therefore, there should have been some evidence that the paper was delivered, or that the intestate intended his signature and ~~acknowledgment before witnesses as vesting the title, and completing all that was necessary for him to do to~~ effect that object. But no such proof is in the record. On the contrary, there is proof that he retained the deed in his possession, and withheld it from Kersey, until he should ascertain whether a suit would be determined against him.

These circumstances are persuasive, that no act was done by the donor by which the title to the slave vests in the donee; and they are sufficient to place the *onus* of proof upon the defendant, that such act was done.

Reverse the judgment, and decree for the complainant.

OWEN'S *adm'r.* vs. OWEN *et als.*

1. A husband who is not indebted, may lawfully vest money in property in trust for the separate use of his wife.
2. When a deed is acknowledged, its execution is acknowledged on the day it bears date, and a registered copy of such deed is *prima facie* evidence of its execution on such day.
3. The non-registration of a deed for a slave, would render such deed void as against the creditors of the bargainors, but it is nevertheless valid as between the parties, and all other persons than such creditors. *Baldwin vs. Baldwin*, 2 Hump. 437.
4. Whether a sale in Chancery will be set aside upon the offer of a larger sum, rests in the discretion of the Chancellor, which the court will not attempt to control, except in case of palpable error. It is the duty of the Chancellor to see that sales are conducted fairly, and under circumstances calculated to bring the highest prices.
5. A deed conveying a slave to the wife, by a husband or other person, is a deed for personal estate, which by the act of 1831, ch. 90, is required to be registered in the county where the person executing it lived at the time of its execution.

The complainant in this case was the widow of one Thompson. She was entitled to dower in the estate of her deceased husband. She intermarried with Herbert Owen. The proceeds of the sale of her dower came to the hands of Herbert Owen. After the marriage, Robert T. Cannon sold and conveyed by deed a slave Tom to J. McN. Thompson, in trust for the exclusive use and benefit of Martha A. Owen. The deed was dated on the 26th day of February, 1835. It was acknowledged and registered in the county of Bedford on the 16th day of September, 1840.

Herbert Owen conveyed the slave in trust to W. Owen, for the benefit of his creditors, on the 29th day of May, 1840.

The bill alleges, that the slave Tom was purchased with the proceeds of the dower interest of the complainant in the estate of her deceased husband, Thompson.

The defendant in his answer insists:

1st. That no part of the money which was paid to Cannon for Tom was raised by the sale of complainant's dower.

2d. That the deed had no existence at the time it bears date, and he requires proof of its execution at that time.

3d. That Thompson had never accepted the trust.

4th. That the deed was not registered in the county of Bedford until the 16th day of September, 1840, which was after the execution of Herbert Owen's deed for the benefit of his

[Owen's adm'r. vs. Owen et als.]

creditors, and that it never had been registered in Williamson county. Cannon resided in Bedford county in 1835, at the time of sale and delivery of Tom, and H. Owen resided in Williamson at the time of its execution, and when it was acknowledged and registered in Bedford.

At the April term, 1842, by consent of parties, the slave was ordered to be sold by the Clerk and Master, upon six months credit, on giving twenty days notice. On 20th day of August next succeeding, the slave was sold to Jabez Owen for the sum of \$100.

This sale the complainant moved to set aside, and supported the motion by affidavits. The facts stated in which are set forth in the opinion delivered by the court.

The Chancellor set aside the sale to J. Owen on a tender of a bid of \$150, and the slave was re-sold, and W. Owen became the purchaser at \$150.

The case came on for final hearing before Chancellor Bramlitt, at the April term, 1843, on bill, answers, replication and proof.

He decreed in favor of the complainant; removed the trustee Thompson, and appointed M. R. Cockrill trustee in his place, and vested in him the proceeds of the sale, for the sole use and benefit of complainant.

William Owen, the trustee for the creditors, and also Jabez Owen, the purchaser at the first sale, appealed from the order of the court allowing a re-sale of the slave.

Fogg and Meigs, for the complainant.

1. As to registration. See *Baldwin vs. Baldwin*, 2 Hump. 493: Act of 1831, ch. 90.

2. The acceptance of the trust by Thompson is not necessary to its validity. *Field vs. Arrowsmith*, 3 Hump. 443.

3. The copy from the Register's books, of Bedford county, is evidence of all that appears on its face, till the contrary is made to appear.

4. Owen in the first place paid for Tom with his own money, but afterwards received money of his wife in lieu of it. But if he did not, still the conveyance of the slave for the benefit of

[Owen's adm'r. vs. Owen et al.:

his wife would be good, for he was not then embarrassed. Story Eq. sec. 355, 357.

As to the propriety of the re-sale, see Barbour's Practice, 537.

Marshall, for the defendants, insisted in the validity of the objections made in the answer of W. Owen, and in behalf of Jabez Owen contended, that the biddings should not have been opened; and in support of this latter position, he cited 4 Kent's Com. 191: 5 Yerg. Rep. 240: 2 McChord's Chan. Rep. 145, 158.

GREEN, J. delivered the opinion of the court.

The complainant Martha A. R. Owen claims title to the slave, Tom, in controversy by virtue of a deed for said negro, executed by Robert T. Cannon, to John McNairy Thompson, for her separate use, dated 26th February, 1835, and acknowledged and registered in Bedford county, the 16th of September, 1840.

The defendant, William Owen, claims the negro by virtue of a deed from Herbert Owen, the husband of said Martha, the complainant, dated the 29th May, 1840.

The complainant alleges, that the negro was purchased with the proceeds of the sale of her land; but this is not satisfactorily proven. Her husband, Herbert Owen, probably paid for the negro with his own money, but he may have received moneys from the sale of a dower estate to which she was entitled.

It appears, however, that in 1835 Herbert Owen was unembarrassed in his circumstances; and a husband who is not indebted, may lawfully vest money in property for the separate use of his wife. Story's Eq. sec. 355-7. It is insisted, however, that the copy of this deed, from the Register's books of Bedford county, furnishes no evidence that it was executed earlier than the time it was acknowledged for registration; and that previously to that time the deed under which the defendant claimed was executed.

We think the copy of this deed, as registered, is *prima facie* evidence of the truth of its contents; that the date is a part of

[Owen's adm'r. vs. Owen et'als.]

the deed, and when Cannon acknowledged the execution of the deed, he acknowledged its execution on the day it bears date.

It would have been competent for the defendant to have proved, that it was antedated; and it would have been as easy for him to have made proof as to the real fact, as it would have been for the complainant to have done so.

As it regards the place of registration, there is no objection to this deed. This is not a marriage contract, but is a deed for personal property, which, by the act of 1831, ch. 90, sec. 5, is required to be registered in the county, where vendor or person executing it lived at the time of its execution. This was done in the present case.

Nor can the fact, that this deed was not registered for five years after its execution, make any difference, so far as the creditors of Herbert Owen are concerned. The non-registration would make it void as regards the creditors of Cannon, the bargainor, but it is valid as between the parties, and all other persons, than such creditors. *Baldwin vs. Baldwin*, 2 Hump. Rep. 473.

2d. It appears from the record, that pending the suit in the Chancery Court, an order was made by the consent of the parties, that the negro be sold by the Clerk and Master, on a credit of six months.

A sale was made in pursuance of this order and Jabez Owen became the purchaser for one hundred dollars.

On the application of the complainant, the biddings were opened at fifty per cent. above the price for which the negro sold; and before any further action was had in that matter, a final decree was pronounced in favor of the complainant in this cause.

Jabez Owen, the purchaser of the negro at the Clerk and Master's sale, insists that he obtained a good title to the slave by the purchase aforesaid; and that the Chancellor had no power to set aside the sale, except upon grounds that would authorize a Court of Chancery to set aside a private sale.

This proposition, in its whole extent cannot be maintained. For although it is not a matter of course to open the biddings upon the application of a party, and the offer of a large sum,

[Owen's adm'r. vs. Owen et als.]

still it is the duty of the Chancellor to see that sales under his order be conducted fairly, and under such circumstances as to insure the best price for the property to be sold. What precise circumstances, calculated to diminish the price of the property, would justify the Chancellor in setting aside the sale, or opening the biddings, must be left in a great degree to his discretion. This court should be slow to control that discretion, unless the case presented a very palpable error in the exercise of it. But this, we think, does not appear in this case. The affidavits show, that the negro is worth from two to four hundred dollars; that he was hired for one hundred dollars per year; and that when put up for sale by the Clerk and Master, he looked badly, as if he was sick. He sold for only one hundred dollars, on six months credit. Here was such gross inadequacy of price, as that it would go far to shake the validity of a private sale. Besides, the negro looked badly, and doubtless bidders were deterred from a belief that he was an unhealthy slave and worth but little. It was indiscreet in the Clerk and Master to sell him under such unfavorable circumstances; and the defendant, who had possession of him, should have interposed to prevent a sale, until any temporary indisposition had passed away.

But, instead of that, they avail themselves of that indisposition to obtain him for a third of his value.

There is no error in this record, and we affirm the decree.

HALL vs. HAWKINS.

1. In an action for a malicious prosecution, to excuse the defendant it must appear that he had probable cause for the prosecution of the plaintiff, or that he acted *bona fide* without malice.
2. Probable cause is the existence of such facts and circumstances, as would excite in a reasonable mind, a belief of the guilt of the person suspected. A belief, however, that a given state of facts would constitute the crime, when they did not, would not furnish probable cause.
3. The want of probable cause, affords a presumption of malice. This, however, may be rebutted by evidence, showing that the party acted in good faith, and in the honest discharge of what he believed to be his duty.

This is an action of trespass on the case, for a malicious prosecution instituted in the Circuit Court for Maury county, by Hall against Hawkins. It was tried at the January term, 1844, by Judge Dillahunt, and a jury of Maury county, on the plea of not guilty, and a verdict and judgment rendered in favor of the defendant, from which the plaintiff appealed.

Houston and Venable, for Hall.

Thomas, for Hawkins.

GREEN, J. delivered the opinion of the court.

This is an action on the case. The declaration has two counts; the one for a malicious prosecution, and the other for slanderous words.

The bill of exceptions show the following facts:—The plaintiff is the natural son of the defendant, and the defendant has a son named Henry, familiarly called by the witnesses, Hal Hawkins. The defendant owned a roan horse, which his son Hal Hawkins usually rode, and called his own; the neighbors called him Hal's horse; and the defendant some times called him Hal's horse, and some times claimed him as his own.

Hal Hawkins, in opposition to his father's command, took the roan horse from the old man's house, and loaned him to the plaintiff to ride to Columbia. The plaintiff lived at S. Rainwater's, where Hal Hawkins kept the roan horse in a pen in the field, with two horses which the plaintiff owned and kept

[Hall vs. Hawkins.]

there also. Hal Hawkins said he kept the roan horse thus concealed in the pen, in the field, to prevent the defendant, his father, from getting him; and Hall the plaintiff said, he kept his horses there to prevent his creditors from levying on them.

While the horses were at Rainwater's, the defendant went there, and enquired of Rainwater if he knew where the roan horse was. Rainwater told him, that Joseph Hall had borrowed him from Hal Hawkins, and had rode him to Columbia. The defendant then requested him to tell the plaintiff to return the horse to him. The plaintiff did not deliver the horse to the defendant, but returned him to Hal Hawkins, who kept him in the pen several days, and then left in the night with Hall, the plaintiff, for Illinois, where Hal Hawkins left the roan horse. When they came back from Illinois, the defendant took out a warrant against both the plaintiff and his son, Hal Hawkins, on a charge of stealing the roan horse. When they were brought to trial, Hal Hawkins and the defendant compromised, but the plaintiff refused to compromise, and demanded a trial, but the prosecution was dropped.

Before the warrant was taken out against the plaintiff, the defendant stated the facts to several of his neighbors, and asked their advice; among these persons so consulted, one was a Justice of the Peace, and another had acted in that capacity. He told them that Joe Hall and his son Hal had stolen his roan horse. He said that Hal Hawkins had taken the horse without his consent, and had taken him to Rainwater's, and that Hall and Hal there kept him concealed for a while in a pen, and afterwards took him off to Illinois, starting in the night, and came back without him. While making this narrative, he wept, and said he had come to ask advice. He was told it was a case of horse stealing, and he then took out a warrant.

The charge of the court sets forth correctly, the principles of law which should govern the jury, in reference to both counts of the declaration, and we need not recite its terms.

The jury found for the defendant, and the plaintiff appealed to this court. The question now is, whether there is any evidence in this record, upon which the verdict of the jury can rest.

[Hall vs. Hawkins.]

In order to excuse the defendant, it must appear, that he had probable cause for the prosecution of the plaintiff for horse stealing, or, that he acted *bona fide* without malice. Probable cause is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of the crime for which he was prosecuted; that is, acting upon the facts within the knowledge of the prosecutor, if a reasonable man would believe the party guilty of the crime charged, there would exist probable cause for the prosecution. It is not sufficient that the party really believed that a crime had been committed; when in truth, the facts within his knowledge constituted no crime. Nor will the fact, that he acted upon the opinion of counsel excuse him, if the statement of facts, upon which the opinion was founded was incorrect, or the opinion itself unwarranted. 2 Starkie, 496. A party may, therefore, act upon the opinion of counsel, and yet have no probable cause for a prosecution. For to constitute probable cause, the facts which are known, when applied to the law properly understood, must be sufficient to create the belief, in a reasonable mind, that the party charged, is guilty of the crime. The want of probable cause, affords a presumption of malice. 2 Starkie, 495. But this presumption, may be rebutted by other evidence, showing that the party acted *bona fide*, and in the honest discharge of that which he believed to be his duty; If he stated the facts fairly to persons he had a right to suppose capable of advising him, and acted upon advice so obtained, exhibiting concern and regret, it may be properly left to the jury, upon all the facts, whether he acted maliciously.

In this case, the jury have found for the defendant; and although we think, there was no probable cause for the prosecution, yet we are not prepared to say that the presumption of malice has not been sufficiently repelled. The defendant seems to have been a very ignorant old man, and having been aggrieved by the misconduct of these young men, he applied for advice to persons he had a right to suppose were qualified to advise him. He stated the facts fairly, and shed tears while talking about it. These were facts the jury were authorized to take into view in determining the question of malice.

[Hall vs. Hawkins.]

As to the count for slander, we think the entire statement of the defendant so explains the sense in which he used the actionable words, as to do away the meaning, which taken alone, they would have had. If a party say another had committed theft, but at the same time, explain the transaction, so as to show that no theft has been committed, no action lies. It was upon this principle that a case at the last term at this place was decided. Faris had said, that the plaintiff had stolen his cotton, but in explaining the manner of the theft, he stated, that the plaintiff, who was entitled to a share of the cotton, had picked out a larger portion than belonged to him, and had kept it for his own use. It was clear, from the entire statement, that the conduct imputed constituted no theft, and therefore no action would lie for speaking the words.

Upon the whole, we think it is not a case in which this court should grant a new trial, for although the evidence may have justified a verdict for the plaintiff, yet it is not such a case, where there is no proof upon which the verdict can rest, or, as this court has sometimes said, where there is a great preponderance of proof against the verdict.

Affirm the judgment.

McGUIRE vs. BLANTON.

1. The statute of limitations of three years, protects an endorser: and the statute of six years only protects a surety on the face of the note. Debt lies on the last undertaking and not on the first.
2. The power to sign the firm name, by endorsement, for accommodation purposes, would not authorize the signature of the firm name in the face of the note as an unconditional and direct surety.

This is an action of debt, which was tried in the Circuit Court of Maury county, by Judge Martin, and a jury, and a verdict and judgment were rendered for the plaintiff, from which the defendant appealed.

Baxter and Houston, for plaintiff in error.

Nicholson, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt against Patrick McGuire, to charge him as a partner of David Looney & Co., upon a note for \$2452. This note is payable to William H. Blanton, adm'r, and is signed "F. McGuire, David Looney & Co. security, A. O. Harris, security." McGuire pleads *non est factum*. The proof shows, that David Looney signed the name of David Looney & Co. to the note, as security of F. McGuire, and there is an entire absence of proof as to Patrick McGuire's actual knowledge of, or assent thereto. There is proof that the endorsement of the name of David Looney & Co. was frequently on notes and bills for Chaffin, Kirk & Co., Mays & Frierson, and other merchants; but whether these endorsements were real or accommodation, does not appear.

The court charged the jury, that David Looney, as a member of the firm, would not be authorized to sign the firm name of David Looney & Co., as security for third persons, so as to bind co-partners, unless he were in the habit of using the firm name by way of accommodation endorsements or securities, with the knowledge of his co-partners. That the jury might infer from such a habit, a knowledge and acquiescence on the part of his co-partners. That if the jury believed that the ha-

[McGuire vs. Blanton.]

bit of accommodation endorsement by David Looney, in the name of the firm, was confined to some few mercantile houses, by arrangement made by him with those houses, and defendant, Patrick McGuire, acquiesced in that habit as to those houses, that would be sufficient for the jury to infer a general authority to use the firm name in accommodation endorsements or securities, unless this special authority with the few houses was made public, or the party taking the note, knew at the time that the authority to endorse for the accommodation of others, was limited to these few houses. And if David Looney had been in the habit of making accommodation endorsements with the consent of McGuire, they would be authorized to infer therefrom the authority to sign the firm name on the face of the note.

This charge is certainly erroneous, and the verdict rendered ought to have been set aside and a new trial granted. Proof that David Looney was in the habit of making accommodation endorsements in the name of the firm, with McGuire's knowledge would not authorize him to sign the firm name as a security in the face of the note; because the liability treated thereby, are of an entirely different character, and of greater responsibility. An endorser is collaterally bound, and if the bill or note be not paid at maturity, is entitled to notice of its dishonor. As security in the face of the note, he is directly bound, and entitled to no notice, if the principal do not pay the debt. As an endorser the statute of limitations of three years protects him, as this court has decided, that no action of debt will lie upon his undertaking. As a security in the face of the note six years must elapse before the statute of limitations can bar a recovery against him, as an action of debt will lie upon the contract. Surely greater authority cannot be claimed under an implied power, than under the same, if express. If McGuire had given Looney a power of attorney, authorizing him to use the firm name in accommodation endorsements of notes or bills, no one would, as we apprehend, contend that the use of the name as a security in the face of the note, would be a legitimate execution of the power. Powers are strictly construed, and

[Stump et al vs. McNairy.]

any attempt on the part of the attorney in fact or agent, to create a greater liability than the power warrants, is void.

But again: there is no proof showing how, or for what purpose, the endorsements of David Looney & Co. on the notes of Chaffin, Kirk & Co. and others were made; whether by the express or implied consent of the firm; whether by Looney or McGuire, or both; or whether they were real or accommodation.

The testimony, then, did not warrant the inference drawn by the jury.

We, therefore, reverse the judgment of the Court below, and remand the case for a new trial.

NOTE.—See *Saffrans vs. State Bank*, 3 Hump.

STUMP *et al.* vs. MCNAIRY.

The continued and uninterrupted use, by the public for twenty years, of a stream for purposes of navigation, constitutes it a public thoroughfare, and the obstruction of it a nuisance, which any one may abate.

This is an action of trespass, brought in the Circuit Court of Davidson county, by Stump and Ewing against N. A. McNairy. Defendant pleaded not guilty, and the case came on for trial before Judge Maney, and a jury of Davidson county.

Stump and Ewing erected a fish trap across a small stream of water running into Cumberland river within the Corporation limits of the town of Nashville. This fish trap was erected by the permission of the owners of the soil on the banks of the stream, and by a license from the Corporation. The stream was in ordinary times only seven or eight feet wide, and not deep enough for any purpose of navigation but once or twice a year, or perhaps oftener. When the Cumberland river was high the water flowed up said stream, and during such times of flood the stream was used for the purpose of conveying from the river to high points of land, rafts of lumber and wood, &c.

[Stamp et al. vs. McNairy.]

This has been the use of the stream for upwards of twenty years.

The defendant, at a time of flood, wishing to have a raft of timber floated up the stream, and finding its progress obstructed by the fish trap, removed it as a nuisance. For this alleged trespass this suit was instituted.

The judge charged the jury, that they should not regard the Corporation license, and though there was no law declaring the stream navigable, yet if there had been a constant and uninterrupted use of this stream for twenty years, for the purposes of navigation, such as those for which McNairy used it, it was a dedication of it to the public, and the stream became a public thoroughfare, and any obstruction of it was a nuisance, which might be legally abated by any one.

The jury found the defendant not guilty, and a judgment was entered accordingly.

The plaintiffs appealed.

Washington and Lea, for plaintiffs in error.

A. Ewing, for the defendant in error, cited Angell on Water Courses, 201, 202: 10 John. 236: 5 Wend.: Angell, 99, 213: 1st Hump. 524.

REESE, J. delivered the opinion of the court.

There is in the lower part of the city of Nashville, a small creek or brook, with high banks, constituting a narrow ravine, which at the distance of a few hundred yards, opens into a wide plain. When the waters of the Cumberland river are high, this ravine and the plain above are filled with eddy-water, and form a very convenient and safe inlet from the river for rafts of timber and lumber, and it has for the last forty years been used, whenever occasion offered, for that purpose by the public.

Over this ravine a bridge passes; and below this bridge the plaintiffs have built a fish trap, which constituted an obstruction to the use and navigation of this inlet by the public. The

[May vs. Mitchell.]

defendant in taking his raft up this inlet removed so much of the plaintiffs' fish trap, as to permit the unobstructed passage of his raft. For this the plaintiffs brought this action. The Corporation of Nashville had given to plaintiffs a license to construct their fish trap.

The Circuit Court charged the jury, that the continued and undisturbed use, by the public, for twenty years or more, of this inlet, would operate as a dedication of it to the public use, and constitute it a public thoroughfare for purposes of navigation, and the obstruction of its use for that purpose, would make the obstruction a public nuisance, which any one might abate. This charge, upon reason and authority, is perfectly correct, and the verdict which was responsive to it, altogether proper.

We affirm the judgment.

MAY vs. MITCHELL.

Where an agent was vested with power to sell personal property for the best price he could procure, a sale on credit was within the range of his discretion, and if made in good faith, and in accordance with the course of trade at the place where the sale was made, would be valid.

This is an action of trespass on the case, instituted by May against Mitchell, in the Circuit Court of Rutherford county.

The declaration charged, that plaintiff delivered three mules to the defendant Mitchell, which Mitchell agreed to take to market and "sell for the best price he could get, and return the proceeds to the plaintiff;" after deducting his expenses and 10 per cent. from the proceeds of the sale of each mule as his compensation for his services; and that defendant failed to comply with his contract.

The defendant pleaded non-assumpsit, and the case came on for trial, and was submitted to a jury at the May term, 1843, Judge Anderson presiding, when it appeared that the declaration was in accordance with the terms of the written agreement

[May vs. Mitchell.]

of the parties, and that upon the delivery of the mules the defendant took them to the State of Georgia, and sold them to a company, consisting of three, and took the notes of said individuals, payable twelve months after date. It appeared that he sold them according to the usual course of trade in Georgia, to wit, upon a credit. There was no evidence going to show that the defendant in the sale did not act in good faith, and sell them on the best terms. It appeared that the mules could not have been sold by Mitchell so advantageously for cash as upon credit.

Mitchell sold other mules at the same time to the same individuals, to wit, Knot, Segur and Crew, and the price of the whole was secured in two notes, the one for \$1,300, and the other \$1,229.

The individuals to whom they were sold, were at the time believed to be solvent, and had considerable estate in land and slaves in their possession, but before the expiration of the credit became insolvent, and the debts were lost.

The Judge told the jury, that the words in the agreement "best price" did not mean necessarily the best cash price, and that the subsequent words, "return the nett proceeds," did not make it obligatory upon Mitchell to sell for ready money; whether Mitchell was authorized to sell upon credit depended upon the authority conferred, and the usages of trade. He told the jury, they should examine the proof and ascertain whether Mitchell had sold the three mules upon credit, and if so, whether the purchasers were in solvent circumstances at the time of the sale, or were so represented to Mitchell by persons that a prudent man would confide in, and, also, whether Mitchell had been diligent and faithful in endeavoring to sell the mules for the best prices, and whether the course of trade in the market where sold was to sell such property on a credit, and whether he had used due diligence in attempting to collect from the purchasers the money they agreed to give for the mules at the expiration of the credit, and was unable to collect it, and whether the credit given was a reasonable one; that if the proof on all these points had satisfied them affirmatively, they should find for the defendant; if he had failed in proving affirmatively

[*May vs. Mitchell.*]

any one of these matters, they should find for the plaintiff, the value of the mules and interest.

The jury rendered a verdict in favor of the defendant, and plaintiff appealed.

Keeble and Currin, for May.

Ready and Burton, for Mitchell.

TURLEY, J. delivered the opinion of the court.

The plaintiff in error delivered the defendant three mules, which he was to take to the southern market, and sell for the best price that could be obtained, and return the nett proceeds thereof. The defendant carried the mules to the State of Georgia, and there sold them upon a credit, and the purchaser proving insolvent, the purchase money has been entirely lost.

There is no pretence that the defendant, in making the sale, did not act in perfect good faith; but it is contended that he had no authority to sell upon a credit, and must, therefore, be held individually responsible for the value of the mules.

To this argument we cannot give our consent. Upon principle and authority, the defendant was vested with a discretionary power to sell upon the best terms that could be procured, according to the course of trade, in the section of country to which the mules were carried. This the proof shows to have been upon a credit, as that description of property could not be otherwise sold for any thing approaching a fair price.

There has been no abuse of trust on the part of the defendant; he has acted in good faith, and the loss sustained has not been the result of his neglect, and it would be severe justice to hold him responsible. See *Story on Agency*, 198: *Chitty on Contracts*, 199: *John. Rep.* 69, 72.

The judgment of the Circuit Court is, therefore, affirmed.

HOWARD *et als.* vs. CLEMMONS *et als.*

1. Two things are necessary to secure the emancipation of a slave, the assent of the master, and the assent of the State, each expressed according to law.
2. If an executor fails or refuses to proceed to obtain the assent of the State to the emancipation of a slave, in accordance with the will of the testator, a Court of Chancery will compel the execution of the trust.
3. Where an executor fails to proceed to obtain the assent of the State to the emancipation of a slave, the delay furnishes no ground for a bill for distribution of the slaves as the property of the distributees, nor for a bill for an account of the value of their labor from the death of their testator.

This bill was filed in the Chancery Court, at Gainsborough. It was tried by Chancellor Ridley, on bill, answers, replications and proof, at the May term, 1843. He dismissed the bill, and the complainants appealed.

Gorin, for the complainants.

Meigs and Quarles, for the defendants.

TURLEY, J. delivered the following opinion of the court.

This is a bill filed by the complainants, a part of the distributees and heirs at law of John Clemmons, deceased, against the defendants, for a distribution of certain negroes, belonging to the said John Clemmons at the time of his death, and for an account of hire, &c. The decree sought is resisted on the ground, that the negroes were directed to be freed by the last will and testament of John Clemmons. The fact, that a direction for that purpose is contained in his will, is not contradicted, but it argued that the executor has not taken the proper steps for obtaining a legal sanction on the part of the State to this claim of emancipation; that he may never do so, and that unless it be done, the negroes will continue to be slaves, subject to the law of distribution.

The executor responds, that it is his intention to apply to the County Court of his county, at the earliest practicable period, for such sanction, and that he has not done so heretofore, on account of the tender years of a portion of the negroes, which

[Howard et als. vs. Clemmons et als.]

renders it improper that they should as yet be emancipated. And here the question in controversy rests.

It has been held invariably in this State, that a devise of emancipation to slaves is good, and that the neglect of an executor to obtain the assent of the State thereto, does not vitiate it. In the case of *Hicklin vs. Hamilton*, 3 Hump. 569, it was held, that to secure the emancipation of a slave under the law of Tennessee, two things were necessary; the consent of the owner expressly, and the assent of the State, given in the manner prescribed by law. That if the executor of a will, which gives the consent of the testator to the emancipation of slaves, fail or refuse to apply to the County Court to obtain the assent of the State, a Court of Chancery will, upon well settled principles, compel the executor to execute the trust, and in case of his death, will appoint a trustee to act in his stead. But in the case under consideration, there is no such obstacle in the way, for the executor expressly answers, that it is his wish and design to execute the trust reposed in him by the will as soon as it can be done to the interest and welfare of those interested in it. It does not lie in the power of the complainants to hasten him by an application to a Court of Chancery, unless they come in the guise of friends of the negroes, seeking their emancipation; but they do not this, but as adversaries, ask that they be continued to be considered as slaves, and as such distributed as other personal property of the estate of John Clemmons, deceased. This they clearly have no right to. The negroes directed to be emancipated by the will, form no portion of the estate to be distributed, and of course no account can be had by the complainants of the proceeds of their labor since the death of the testator.

The decree of the Chancellor, dismissing the bill, will be affirmed, with costs.

SIMS et als. vs. SIMS et als.

1. Before secondary evidence is admissible, it must appear that the primary evidence was not procurable.
2. The bill charged, that an alleged deed, on which the defendant rested his defence, had no valid existence. The answer averred the existence and validity of the deed. Held, that this state of pleadings did not dispense with the necessity of defendant's proving affirmatively the existence and validity of such deed.

Meigs, for complainants.

E. H. Ewing, Trimble and Campbell, for defendants

REESE, J. delivered the opinion of the court.

The ancestor of the complainants, in June, 1822, conveyed the tract of land in the bill mentioned to John G. Sims, in trust, to secure the payment of a debt of \$2021, to Walter B. Sims, and John S. Green. The persons last named, on the 4th November, 1824, in a deed, reciting their equitable interest as above stated, conveyed the same tract to John G. Sims, administrator of the will annexed of Walter Sims, deceased, in trust, to secure the payment of a certain bond given by them to the testator, and the interest in which was bequeathed by him to his widow and relict. In 1831, the last named person filed her bill against Walter B. Sims, John S. Green, William P. Sims, and the heirs of John G. Sims, then dead, for a foreclosure of the last named mortgage, and in 1834 obtained a decree of foreclosure and sale, and the land was sold to William P. Sims for the sum of \$11 00, which sale was confirmed. The complainants, the heirs of David Sims, were not made parties to the suit; and they have filed this bill against all the above named parties, to redeem the land conveyed by their ancestor.

By the deed of June, 1822, the defendants insist, that in November, 1822, David Sims relinquished his equity of redemption to Walter B. Sims, and John S. Green. They exhibit with their answers what purports to be a registry copy of said deed; but the probate upon which the registration took place,

[Sims et al. vs. Sims et al.]

not being conformable to the requirements of the statutes, that copy is no proof whatever of the existence of any original.

The testimony of Walter B. Sims was taken on behalf of the defendants. He fully testifies to the existence, contents and character, and to the loss, of such original deed. After this, complainants filed a supplemental bill, in which they charge, that the deed of which the paper exhibited with the answer, purports to be a copy, never was executed by their ancestor; that if signed by him, the same was never delivered by him; that no additional consideration was given to him beyond the debt in the deed of trust mentioned; that there may be internal evidence on the face of the paper, if produced, to satisfy the court, that it is not genuine, or at least to demonstrate its true character, and for these reasons they pray that it may be produced; they suspecting that said paper was really in the possession or power of the defendants.

Various interrogatories are propounded to the defendants, touching conversations with them, and representations by them as to said paper, and as to the loss of said paper, &c., but no interrogatory is propounded to them as to the genuineness, contents, character or validity of said paper.

The complainants are entitled to the redemption of the land as prayed for in their bill, unless the existence, character and validity of the deed of November, 1822, relinquishing the equity of redemption have been legally established by competent and sufficient testimony, or unless such testimony be dispensed with, by means of the technical effect to be given to the statement of the bill filed as a supplement, as to the said deed, and the response of the answer of Walter B. Sims.

As to the first point, the existence and legal validity of the deed, there is no testimony whatever, but that found in the deposition of Walter B. Sims. Without enquiring into his competency as affected by his attitude in the suit, by his alledged pecuniary interest in the event, or by his being the bargainee in the alledged conveyance, we deem it sufficient to state, that his testimony makes out that the original instrument had attesting witnesses, and that it is not shown that those witnesses are dead, or that for other adequate reasons their proof cannot

[*Sims et als. vs. Sims et als.*]

be produced. Under such circumstances their testimony to the execution of the instrument being primary evidence, cannot be dispensed with by the substitution of the secondary evidence in the record.

Before the secondary evidence is admissible, it must appear that that which is primary is not procurable. See Greanleaf's Evidence, p. 94, 604, 1 and 2 edition.

2. The statement in the supplemental bill, in substance is, that no genuine and valid deed, legally executed, conveying or relinquishing the equity of redemption, ever, in fact, existed.

The answer is, that such a deed, did in fact have an existence, and had been lost. Does this state of the pleadings, by operation of any technical rule, exempt the defendants from the necessity and obligation of proving, affirmatively, the existence and validity of the instrument, and devolve upon the complainants the duty of proving the negative fact, so to speak, of its non-existence? Most assuredly not. There are cases in which, from the object and tenor of the allegations of the bill, and the character of the interrogatories propounded to a defendant, the complainant intends to make, and does make the defendant a witness in the cause; a witness too, whose testimony must stand as true, unless controverted by the proof of two witnesses, or of one witness, supported by corroborating circumstances. But the present is not such a case; nothing would be more absurd, than to hold it so to be. See upon the subject of this rule in Equity the case of *Jones and Perry*, 10 Yerg. Rep., p. 85.

Upon the whole, then, we affirm the decreè of the Chancellor.

SWANSON *vs.* WHITE *et als.*

Where goods or choses in action are furnished to the buyer at a price greatly above their value, to enable him, by selling them at their real value, to raise money, such transaction is held to be usurious.

Bodenhamer was embarrassed, and applied to White for a loan of money. White told him he would get some bonds of the State of Tennessee, if he would take them. White procured two bonds calling for a thousand dollars each, which, at the market price, were worth about six hundred each. They were sold to Bodenhamer at \$2100, for which sum Bodenhamer executed his note to White. Bodenhamer sold them to Goff & Balentine at \$1200. Bodenhamer gave a deed of trust to White for his land and slaves, to secure to him the payment of the said sum of \$2100. Swanson had recovered a judgment in the Circuit Court of Giles county against Bodenhamer for the sum of \$559; execution was issued, and returned without satisfaction; and thereupon this bill was filed against Bodenhamer, White and the trustee, charging that the sale of the State bonds was a contrivance to loan money and evade the statute against usury, and praying that the deed of trust be executed by a sale of the land and slaves, and that the sum really due said White, to wit, \$1200, with interest thereupon, be paid to him, and the balance of proceeds be applied to the satisfaction of complainant's judgment.

The case was tried by Chancellor Cahal, on bill, answers, replications and proof. The Chancellor being satisfied that the transaction between White and Bodenhamer was usurious, decreed a sale of the estate conveyed and a satisfaction of the claims, according to the prayer of the bill.

The defendant White appealed.

Wright, for complainant.

1st. The transaction in relation to the State bonds between Bodenhamer and White is usurious and the latter only entitled to receive of the former what the bonds were re-sold for and six per cent. interest. *Vide* Comyn on the Law of Usu-

[Swanson vs. White et als.]

ry, 5 Law Library, top pages 36, 37, 43 and 44; *Burker vs. Vansommer*, 1 Br. Ch. Cases, 149; *Lowe vs. Waller*, Douglas' Rep. 236; Pothier's Treatises on Contracts, sec. 68, page 22. *Vide* also, Usury Acts 1741, (1 Scott's Rev. 53,) 1819, (2 Scott's Rev. 485,) 1835, (Nich. & Car. Rev. 407.) The words "directly or indirectly," in the statute, cover the case. The British acts and those of Tennessee are alike. (*Vide* those in the Appendix to Comyn on Usury, top page from 96 to 107.)

This is not like the cases of a loan or transfer of stock, &c. to be found in Comyn on Usury, 40, 41 and 42; the cases of *Tate vs. Willings*, *Pike vs. Ledwell* and others. Here is no risk or contingency of any kind to White. His money is certain. Comyn, 43 and 44.

2nd. The creditor has a right to recover the usury from the usurer, if it is paid over; for it is a chose in action and debt, between the debtor and usurer, and under our act of 1832, (Nich. & Car. Rev. 222,) enlarging the chancery jurisdiction, the creditor may recover it. In N. Carolina it has been decided, that a conveyance infected with usury is no bar to the widow's dower. *Norwood vs. Morrow et al.* 4 Dev. & Batt. Law Rep. 442; and in *Moffut et al. vs. McDowell et al.* 1 Mc Chord's Ch. Rep. 434, it seemed to be conceded that cases might exist, where creditors would be let in to show usury and enlarge the fund to pay their debts.

If the usury has not been paid (as is the case here) of course the creditor has a right to cut down the dealings to the real debt; for the contract is really void for the excess and the deed only a security for the sum actually due and interest, in this case the value of the State bonds.

But the act of 1843-4 (p. 204) covers this case. By it creditors may recover the usury, if paid. Here it is not paid, but only secured to be paid; and when paid, may be recovered, because the act says so. The payment, if ever made, will be after the act. Now why may not the creditor prevent its payment? Here is a fund for real *bona fide* creditors. In its distribution, is it not material to enquire who have debts and their real amounts?

[*Swanson vs. White et al.*]

N. S. Brown, for the defendant.

It is insisted, as one of the principal grounds, in the bill, that the sale of the State bonds by defendant *A. C. White*, to *Bodenhamer*, was usurious, and to that extent the consideration in the deed of trust inadequate.

1. This allegation in the bill is denied in the answer of *White*, and there is no proof which shows that the object was to evade the statute. On the part of *White*, the transaction was a sale with the ordinary accompaniments, and made in good faith. The seller was endeavoring to get as high a price as he could for his property, and the purchaser to get it at the lowest rate. The deposition of *Bodenhamer* himself proves the fairness of the transaction.

How then is the transaction to be impeached?

"The court will never presume a contract to be usurious, without proof." See *McGuire vs. Warder*, 1 Wash. 368.

"Usury is the taking of more than the law allows upon a loan or forbearance of a debt. To make a contract usurious, it must be apparent upon the face of it, or by evidence, that the intent of the parties in the creation of it, was by means of shift or device to take more than legal interest for the loan or forbearance of money." See *Moore vs. McKay*, 1 Beatty, 287.

Again: To constitute usury there must be a borrowing and a lending, with an intent to exact exorbitant interest, &c. See 4 East, 55; 1 Taunton, 449; 7 John. C. R. 77; 4 Hen. & Mun. 490; 2 Call, 92, 121. And there must be a corrupt agreement. 2 Call, 111.

Again: There are three requisites to constitute usury. 1st, a loan, either expressed or implied: 2nd, an understanding that the money lent shall or may be returned: 3rd, that a greater rate of interest than is allowed by statute shall be paid. See *Peters' U. S. Reports*, 205, 224; 2 Cowen, 712; 7 Peters, 109.

There is some proof to show that *White* was in the habit of shaving notes. But the general character and habit of a usurer is not a foundation for presuming usury in a particular loan. See *Jackson vs. Smith*, 7 Cowen, 712.

[Swanson vs. White et al.]

That a sale of State bonds, upon the terms of the present, might be made, without usury, I suppose will not be questioned. For "a *bona fide* sale of bank stock, at however high a price, is not usury; to constitute which, there must be a treaty for the loan or forbearance of money." See *Skipwith vs. Gibson*, 4 Hen. & Munford, 490, and *Greenhow vs. Harris*, 6 Munford, 472.

"Depreciated bank paper may be the subject of sale, without the imputation of usury. And if an individual executes his note for specie at a future day, in consideration of the present delivery of depreciated bank paper, whether for a greater or less amount, it is not evidence *per se* of usury." See *Boswell vs. Clarkson*, 1 J. J. Marshall, 49.

"Borrowing and lending, or any device to avoid the statute, must be established before there can be usury. The Chancellor will not, from the solitary fact that a note for specie payable in twelve months was executed for the same amount of depreciated bank paper, conclude that there was usury." See *Talbot vs. Warfield*, 3 J. J. Marshall, 84: see also 2 Munford, 36.

2. The proof shows, that the cash value of the note executed for the State bonds, exceeded very little, if any, the cash value of the bonds themselves, at the time of the transaction; and at the time of the maturity of the notes, the balance was still nearly equal; for as the discount upon such paper diminished, so did that upon State bonds. Usury, therefore, cannot be imputed on the ground of inadequacy in the consideration.

The proof also shows, that at the time of the trade, White was of opinion that State bonds were advancing, and was reluctant therefore to consummate it. There is no proof to show that he knew at what rate Bodenhamer sold the bonds, or would be compelled to sell them, or whether it was his purpose to sell them or not. And suppose he did know the precise object of Bodenhamer, that he intended to convert the bonds, and at a discount of 33 $\frac{1}{3}$ per cent. does this prove a usurious intent on the part of White? a shift or device to evade the statute? For his motives must concur, in order to implicate him. There must be a corrupt agreement. See 2 Call, 111.

[Swanson vs. White et als.]

TURLEY, J. delivered the opinion of the court.

This is a bill of complaint filed against Newton White and others, by William E. Swanson, a judgment creditor of John W. Bodenhamer, to have certain deeds of trust, made by said Bodenhamer for the benefit of Newton White and others, executed, and the balance of the proceeds, after paying what is legally due the several *cestuis que trust*, appropriated to the payment of his judgment.

White alone appeals from the decision of the Chancellor; and the question presented by the record as to him, is, whether there was usury in the transaction out of which arose the liability for which the deed of trust from Bodenhamer for his benefit was executed. The proof shows, that Bodenhamer was much embarrassed with debt; that he applied to White to borrow money; that White informed him that he could not lend him money, but that he would in a short time have some Tennessee State bonds which he would let him have, if they would answer his purpose. Afterwards, White procured two bonds of the State for one thousand dollars each, which he let Bodenhamer have for the sum of two thousand one hundred dollars, it being an advance of one hundred dollars upon the nominal value of the bonds, and took the deed of trust which forms the subject matter of this controversy, to secure the payment of that amount of consideration.

The proof also shows very satisfactorily, that at the time White let Bodenhamer have the notes he knew that he procured them with the view of raising money on them in the market for the payment of his debts; that he knew who they were in all probability to be sold to, viz, Ballentine & Goff, they having offered \$1262, the best price that could be had for them, and this by them in part consideration that an account of Bodenhamer should be settled as a part payment. The proof abundantly shows also, that six hundred dollars each was as much as the bonds were worth at the time in the money market, being about three fifths of their nominal value, and that this fact was well known to defendant White at the time he let Bodenhamer have them.

[Swanson vs. White et als.]

Now, was this a usurious transaction between White and Bodenhamer? We are well satisfied that it was. All attempts to evade the usury laws are watched by the courts with anxious jealousy, and promptly put down. Such attempts as the present are of no new origin; they have been resorted to again and again, in England and the United States, and no doubt in every other country where usury is forbid: our law books are full of such cases arising out of them; and they have been universally held to be usurious, no matter what kind of property has been given instead of money, if the design of the parties at the time was that money was to be obtained upon it: indeed, vain would be our usury laws if such were not the case. I will not lend you money: oh no, I cannot legally charge more than six per cent. for money, but I can charge what I please for any property: here is a negro that you can readily sell for six hundred dollars; I know a man that will give that price for him: you give me a thousand dollars and you may have him. What is this but taking a thousand dollars for the loan and forbearance of six hundred? Indeed it is the worst and most dangerous of all attempts at usury, because generally the most difficult of detection.

The present case is one of great oppression. Tennessee State bonds are sold for the known and express purpose of raising money on them; it is well known to both parties that they are at an actual discount of two fifths of their nominal value; and yet they are sold at a premium of one hundred dollars, an advance of nine hundred, upon what, it was well known to both, would only yield about twelve, seventy-five per cent; the most extortionate transaction that has yet been before us, though we have had many of the kind in the last three or four years.

The law provides, that not more than six per cent. shall be reserved, directly or indirectly, and applies to this case and avoids the contract, so far as there is usury in it.

The decree of the Chancellor is therefore affirmed.

WEBB *et als.* vs. ARMSTRONG.

1. A writ of *venditioni exponas* is an execution within the meaning of the statutes authorizing motions against sheriffs and constables for failure to return executions.
2. A failure to return an execution renders the officer liable for the whole amount of the execution, and the insolvency of the defendant in the execution is no defence.
3. If it appear to the court in any way, that a suit in its inception or progress is infected by champerty, it is the duty of the court to dismiss the suit. The statute authorizing a proceeding by bill or by interrogatories propounded, was not intended to restrict, but to amplify the remedies.

This motion was made in the name of Armstrong against Webb, former sheriff of Giles county, and his sureties, for a failure on the part of Webb to return a *venditioni exponas*. Some lots of land had been sold by virtue of the writ and the sale produced only a small portion of the debt which the writ demanded.

The sheriff did not return the writ. On the trial of the motion, before Judge Marchbanks, the defendants proved that the defendant was insolvent before and after the rendition of the judgment, and that the money could not have been made. They also proved, by one Jackson, that he had paid about the sum of one thousand dollars for Webb, and that he had made an agreement with Armstrong the plaintiff in the execution that he would prosecute this motion in the name of Armstrong for his own benefit, and that if he collected the money he should pay Armstrong fifty cents on each dollar so collected.

A judgment was rendered in favor of Armstrong for the full amount demanded in the execution, and the defendants appealed.

A. Wright, for plaintiffs in error.

Jones, for the defendant in error.

REESE, J. delivered the opinion of the court.

Webb had been sheriff of Giles county, and an execution had been placed in his hands in favor of Armstrong against George W. Greaves, and returned levied upon certain lots in the town

[Webb et al. vs. Armstrong.]

of Pulaski, and not time to sell the same. Upon this, a *venditioni exponas* issued: the lots were sold, and Armstrong procured one Crow to bid for them, and they were struck off to him for the sum of 40 dollars. Greaves was insolvent and really had no valid interest in these lots. For the non-return of the last process, the motion in the present case was made against Webb and his sureties, claiming the extreme rigor of the *lex scripta*; adopted on grounds of public policy, in a case where no injury whatever had been done to the plaintiff by the non-return in time of the process.

In defence, it is insisted that the term "execution" in the statute giving the motion, does not embrace the process of *venditioni exponas*.

We are of opinion, that it is comprehended within the meaning of the terms used and also within the objects of the statute.

It is an execution, or a writ to satisfy the judgment on behalf of the plaintiff, and its due return is as important as that of other process of the same general description.

It is said again for the defendant, that he ought not to be held liable beyond the amount for which the lots sold. But the statute makes him liable for the amount of the judgment in terms, if he do not return the process, without reference to the solvency of the debtor or the amount which was or might have been actually collected. It is the stern and rigid policy of the law, adopted to correct a great and growing evil, the non-return of process of execution: and the plaintiff makes out his case fully and entirely, by showing the reception of the execution by the sheriff, and its non-return by him. The sheriff cannot defend himself by showing that the debtor was insolvent, or that he received a given amount and could make no more.

But it was proved by one Jackson in this case, that he was using the name of Armstrong in this motion, under an agreement to give him half of what might be collected; that he was doing this for his own indemnity, having lost money by Webb.

This is gross champerty; clearly made to appear, not indeed by interrogatories, propounded in the mode pointed out in the

[Norton vs. Whitesides.]

statute, but by the voluntary statement of Jackson as a witness in the case. The fact is all that is important; the mode of ascertaining the fact is a matter of form. The statute by pointing out the means of ascertaining champertous agreements, by bill and by interrogatories formally propounded, did not intend to restrict, but to amplify the remedies for punishing such agreements.

Before the statute, and since the statute, if it satisfactorily appear to the court in proof, that the suit, in its origin and progress, is affected by champerty, it is a duty of the court not to permit itself to become the organ and instrument to consummate such agreements, but to repel the plaintiff and his suit. And this court, therefore, upon this ground, reversing the judgment of the Circuit Court, and proceeding to give such judgment as the Circuit Court ought to have given, adjudge that the plaintiff below take nothing by his motion, and that defendants go hence without day.

NORTON vs. WHITESIDES.

A defendant in an action of forcible entry and detainer cannot dispense with the necessity of giving bond and security for rent, as required by the act of 1842, ch. 186, by taking the pauper's oath.

Reid, for Whitesides.

The records do not show who appeared for defendant.

RESE, J. delivered the opinion of the court.

Whitesides obtained a judgment in a proceeding for unlawful detainer, before a Justice, against Norton. Norton took the case to the Circuit Court by writ of *certiorari*: he did not give the bond, with surety, for the purpose of securing to the plaintiff one year's rent of the premises, in the case, as required by

[Norton vs. Whitesides.]

the act of 1842, ch. 186: but as a substitute for the bond, he took what is familiarly called the pauper's oath, under the act of 1821.

A rule was entered in the Circuit Court by the plaintiff, to dismiss the writs of *certiorari* and *supersedeas*.

This rule, on argument, was discharged. In this, we think the Circuit Court erred. A main object, it seems to us, of the act of 1842, was to provide a remedy for cases such as this. The fact was that the tenant pertinaciously held on to the possession through a long course of litigation, and in the end, whatever the result of the suit, he was a clear gainer of the rents and profits of the possession *pendente lite* and the landlord frequently got no indemnity.

And this would certainly be the case where the defendant was a pauper.

To hold, then, since the act of 1842, that the tenant can take up his case in *forma pauperis*, would contravene its main object, defeat the remedy intended to be furnished, and almost operate the repeal of the statute.

For this reason, we reverse the judgment of the Circuit Court, set aside the verdict, and dismiss the writs of *certiorari* and *supersedeas*, and award a *procedendo* to the Justice, commanding him to issue a writ of possession.

TYNER vs. THE STATE.

1. Conduct exhibiting satisfactory indications of guilt, is not sufficient to sustain a conviction, unless there be also satisfactory evidence that a crime has been committed; as in case of alleged larceny, that the property has been feloniously taken and carried away.
2. A mere declaration in evidence that the horse has been stolen, is not sufficient evidence of the *corpus delicti*. The facts must appear so that the judge and jury may see whether those facts in point of law amounted to a felonious taking and carrying away of the property in question.

Peter Tyner was indicted in the Criminal Court of Davidson county for stealing a horse, the alledged property of one Wilson Page, and was tried by Judge Turner and a jury at the July term, 1844, convicted, and sentenced to three years' confinement in the state prison.

He appealed from this judgment.

Ferguson and *Haynes*, for the plaintiff in error.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

The prisoner was indicted and convicted of horse stealing, in the Criminal Court of the county of Davidson. The indictment alleges the property stolen to belong to one Wilson Page. The substance of the proof in the case is, that the prisoner rode the horse to Nashville in the evening, and stopped at a tavern, the appearance of the horse indicating that he had been ridden with speed. The prisoner almost immediately procured an auctioneer to sell the horse at public outcry, and he was sold for the sum of twenty dollars, being worth about fifty. As the sale was in progress, the auctioneer thought the prisoner looked excited and apprehensive, which induced him to think the horse had been stolen. Prisoner had registered himself at the tavern by a feigned or assumed name; and when he received the money for which the horse had been sold, he left the tavern, without paying his bill, or reclaiming the old saddle and bridle, and went on board a steamboat. It happened, that

[Tyner vs. The State.]

the auctioneer of the horse, in company with another person, went the same evening aboard the same steamboat. Upon seeing them, the prisoner leaped from the stern guard of the boat, upon the wharf, and ran down Water street. The next morning, the auctioneer went on board the same boat, and saw the prisoner there. When the prisoner saw him he leaped from the stern of the boat into the river and swam ashore. The auctioneer arrested him for stealing the horse. These circumstances strongly manifest a consciousness on the part of the prisoner, that some flagrant wrong had been committed by him, and an apprehension that it was known; which wrong probably related to his possession and disposition of the horse. We are told by an early and most venerable authority, that the wicked fly, when no one pursues; and we are told elsewhere, that conscience makes men cowards. If the *corpus delicti* had been proved,—that is, that the horse had been stolen,—much less than the circumstances proved would have established that the prisoner was the thief; but strong as the circumstances are, they are not proper and adequate, of themselves, to prove the *corpus delicti*, namely, that the horse was so taken, and carried away from the possession of the owner, as to constitute such taking and carrying away a felony. These circumstances might all have occurred, if the horse had been fraudulently converted or forcibly seized by the prisoner; or if he had committed some crime unconnected with the possession of the horse, the knowledge of which he feared might have reached the public. The prosecutor, in the court below, aware of this, called a witness, who proved that a man calling himself Wilson Page, whom he knew not, came to Nashville, claimed the horse and took him away; and of this witness, the counsel for the prisoner enquired, “where the man calling himself Wilson Page said he came from.” The witness replied, that “he said he lived in Russellville, Kentucky, but that the horse was stolen from him at Clarksville.” These declarations of Page, or of the person claiming the horse, thus elicited and unobjected to, were before the court and jury in a manner to prevent the prisoner from here assigning their admission by the court as error. It was, then, competently proved

[Tyner vs. The State.]

that a man calling himself Wilson Page said that the horse was stolen from him at Clarksville. The jury had evidence to believe that this man said so. What evidence had they that he said the truth? He was not on oath; he was not even in the presence of the prisoner. Moreover, his statement involves a question of fact and of law: he says that the horse was stolen: how, and under what circumstances was the property taken? It would be desirable to know more than his opinion that the facts attending the transaction constituted larceny: it would be desirable to know the facts themselves, so that the court and jury could judge for themselves, whether those facts in point of law amounted to a felonious taking and carrying away of the property.

Upon the whole, therefore, the evidence establishing the *corpus delicti* is too slight to sustain a verdict of conviction. The crime, as well as the criminal, must be shown. Upon general principles, therefore, and for sake of the precedent, rather than from any apprehension of punishing, in this case, an innocent man, we are constrained to reverse the judgment and award a new trial.

BOYD *et als.* vs. BAYNHAM.

A recovery of a judgment against "the defendants," embraces those only who are served with process and who appear and defend the suit.

Garland, for plaintiffs in error.

Allen, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of debt commenced by Baynham against Hopson, Boyd and Young. Process was served upon Boyd and Young, and returned as to Hopson, "not to be found in my county."

The declaration is filed against the three, but a *noti prosequi* is afterwards entered as to Hopson. Pleas, payment and set-off; replication and issue.

The judgment is headed, "John Baynham *vs.* George B. Hopson, George C. Boyd and Henry Young." The verdict is, that the plaintiffs recover of the defendants: and the question now is, whether George B. Hopson is a defendant, against whom the judgment is thus rendered. And we think he is not. He was dropped in the proceeding by a *not. pros.* as the plaintiff might well do before pleas; and although his name is inserted in the margin of the judgment, yet he is not mentioned by name in the body of the judgment, he not having been served with process; having never entered his appearance, he is no party to the record, and a judgment in so many words, "against the defendants," cannot be made to embrace him; but must be held as only in force and obligatory upon the defendants upon whom process was served, and who appeared and defended, viz, Boyd and Young.

There being no judgment against Hopson, there is no error in that against Boyd and Young; and the same must be affirmed.

MEDLEY vs. DAVIS.

1. A vendor asserting his lien for purchase money by sale of the real estate, is not entitled to rent for the land whilst occupied by vendee.
2. In this case real estate was sold by decree for the payment of the purchase money, and the proceeds did not satisfy the decree. During the pendency of the suit the land was in possession of the court, and rents were paid over to a receiver. It was held, that such rents should be appropriated to the satisfaction of the decree.

Medley owed Davis \$5,500, and on 31st day of January, 1839, she conveyed to Davis 264 acres of land, lying in Williamson county, in consideration of which, Davis gave up the note of \$5,500, and handed to her one note on Walsh & Harris for \$3289, and one on Davis & Grant for \$1400. Medley urged that Davis had agreed to guaranty the collection of the note on Walsh & Harris, and on Davis & Grant, and to secure the payment by mortgage on real estate, and that he had failed to do so, and she retained possession of the land.

This bill was filed in the Chancery Court at Franklin, in 1839, by Medley against Davis, charging that Davis had failed to give the mortgages, and enter into the guaranties agreed upon at the time of the sale, and that he had illegally, and without a valid delivery, obtained possession of the deed of conveyance.

The defendant answered.

At the October term, 1840, the Chancellor, on motion of complainant, appointed a receiver to rent out the land and collect the proceeds. At the April term, 1841, the case having been arbitrated, the award was entered as the decree of the court. The land was decreed to be sold to satisfy the note of Walsh & Harris. The land was sold by the Clerk and Master, and did not satisfy the note.

The land during the pending of the suit rented for \$350.

The presiding Chancellor, at the April term, 1842, ordered the Clerk to pay over the rents to complainant.

From this decree the defendant appealed.

Fogg, for complainant.

Alexander, for defendant.

[Medley vs. Davis.]

REESE, J. delivered the opinion of the court.

The only question before us is, to whom properly belongs a certain fund in the hands of the receiver, the proceeds of the rent accruing *pendente lite*, upon a tract of land, the subject of controversy in the suit, which had been conveyed by the complainant to the defendant, and which was decreed to be sold, to pay to the complainant the consideration or price to be given for the same. And this question of rent is not a general one, as whether a vendee in possession shall be held, upon a sale to raise the consideration, to account for rents received by him. If it were, there would be little difficulty in the case. For we take it, that a mortgagor remaining in possession cannot be called on to refund to the mortgagee, upon the sale of the premises, the rents previously received by him; and still less, perhaps, could a vendor, asserting his lien upon the premises for the consideration of land sold by him, insist that the vendee in possession should account to him for the amount of rents he might have received.

At the time of the bill filed in this case, the vendee had no possession of the land, nor by the terms of the contract, a right to the possession, the period not having yet arrived at which he was to enter into the possession. One object of the bill was, to prevent the defendant from obtaining the possession, and this upon the ground, that he had failed to give certain mortgages and guaranties stipulated to be given in order to secure the consideration. A receiver was appointed, on motion of the complainant, and no motion on the other side was made to discharge him. During the time the possession was so in the Court of Chancery, the rent accrued, and the fund was created. Under these circumstances, the land having been sold by the Clerk and Master in pursuance of the Chancellor's decree, and the complainant's demand not having been satisfied thereby, the simple question is, whether the fund created by the order and action of the court, and in its custody, shall upon equitable principles, be handed over to the complainant or to the defendant?

And we are constrained to say, that we can perceive no pro-

[*Pillow vs. Langtree.*]

per ground upon which we can refuse to hand it over to the former.

PILLOW vs. LANGTREE.

A decree of bankruptcy against a debtor, vests his equities of redemption in the assignee, and no right of redemption arises from a deposit of money by a creditor in the hands of the Clerk, or a tender to the debtor, after such decree.

This case was tried in the Chancery Court at Columbia, on bill, answers, replications and proof, by Chancellor Bramlitt, and a decree was entered for the complainants.

The defendant appealed.

Humphreys, for complainant.

H. Thomas, for defendants.

REXSE, J. delivered the opinion of the court.

Langtree & Jenkins obtained against one Vincent, in the Circuit Court for Tipton county, a judgment for \$3500, and one Rhodes obtained in the same court, against the same party, a judgment for about the sum of \$280. Executions issued upon these judgments, and were levied by the Sheriff of Tipton county upon a tract of land, containing thirty-two acres, lying in said county, and on the 15th February, 1841, the tract of land was sold, and Langtree & Jenkins became the highest and last bidders, for the sum of \$100, and the Sheriff executed to them a deed of conveyance for the same.

On the fourth of February, 1843, the complainant procured from Rhodes an assignment of his judgment, and in a few days thereafter, and before the expiration of two years from the time of the sale, he deposited with the Clerk of the County Court of Tipton, the amount bid by Langtree & Jenkins, with ten per cent. thereon, and offered to credit his judgment, assigned by Rhodes against Vincent, with ten per cent., but before these

[Pillow vs. Langtree.]

proceedings, and before the assignment of Rhodes' judgment to the complainant, Vincent, the debtor, had filed his petition in the District Court of the United States for the District of West Tennessee, at Jackson, to obtain the benefit of the bankrupt act, passed by the Congress of the United States, and by the judgment and decree of said court, had been duly declared a bankrupt, and has since obtained his certificate. The complainant has filed his bill to redeem this land, so sold and conveyed by the Sheriff of Tipton county to Langtree & Jenkins, and to divest their legal title and that of their assignees, and to have the same vested in himself. And the question is, whether, under the circumstances stated, he is entitled thereto?

The 3d section of the act of Congress referred to, provides, "That all the property, and rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt by a decree of the proper court declared to be a bankrupt, within this act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or conveyance whatever, and the same shall be vested, by force of the same decree, in the assignee," &c.

The 11th section provides, "That the assignee shall have full authority, by and under the order and direction of the proper court of bankruptcy, to redeem and discharge any mortgage, or pledge, or deposits, or lien upon any property, real or personal, whether payable *in presenti*, or at a future day, and to tender a due performance of the conditions thereof."

The 5th section provides, that creditors "shall be entitled to share in the bankrupt's property and effects *pro rata*, without any priority or preference whatsoever."

What legal effect and operation do these several provisions produce upon the relations and rights of the parties in reference to the land, under the circumstances in which it was placed? Langtree & Jenkins were the purchasers, and had the legal title by the Sheriff's deed, subject for the term of two years to be divested, by the debtor or his judgment creditors, upon their payment of the principal sum bid and ten per cent. thereon, unless such purchaser being a judgment creditor would

[Pillow vs. Langtree.]

over-bid them, which he might do, *toties quoties*, until he exhausted his judgment.

The leading object of the statute was, to make the land, although sold and conveyed by the Sheriff, a fund during two years for the payment of as large an amount as practicable of the debtor's judgment liabilities, or to restore to him the land if able to redeem and there be no creditors offering to do so. As among the creditors, it is a process of consecutive priorities: each redeeming creditor is placed in the situation of the purchaser, and may have all his advances refunded to him, and if he so elects, may have his judgment exhausted before he can have his title divested, or his lien removed. The legal basis of the whole matter, however, is the debtor's right of redemption. It has been seen, that this right is vested, by the terms of the bankrupt law, in the assignee in bankruptcy, to be exercised under the direction of the court.

When the debtor's right is so transferred to the assignee in bankruptcy, what is the condition of the judgment creditor's right? can he overlook the decree and proceedings in bankruptcy, escape the *pro rata* principle of distribution, and seize upon this fund to obtain a priority and full satisfaction of his judgment? To do so, would contravene all the principles and provisions of the bankrupt act. If this might be done, the assignee would find, when he came to redeem under the direction of the court, that the fund intended by him for the benefit of the general creditors, has been exhausted by competition among creditors out of the bankrupt court, by a proceeding of their own, by which they had obtained full satisfaction for their debts. Clearly such proceedings would not be lawful. It is said such a construction should be given to the bankrupt law, when practicable, as will least interfere with State legislation. Certainly it should. And upon this principle, the purchaser being a judgment creditor, or one redeeming from him before petition or decree in bankruptcy, would have been permitted to resist the redemption of the assignee to the whole extent of his judgment. But after decree, to suffer a priority process to go on out of court as to one class of funds, defeating the redemp-

[*Benton vs. Pope et als.*]

tion by the assignée, while the *pro rata* principle is enforced in court, could not be tolerated.

It is said the attempt to redeem may be declared good for the benefit of the general creditors. We answer; we have no right so to declare it here, and in this cause, moreover, the act was not done by the order of the court of bankruptcy, or in the name of the assignee, or on behalf of the general creditors, but it was done by one, having no right, and for his own benefit, and produces no effect on the rights of the defendants. We deem it useless to discuss the other point in the case.

Reverse the decree, and dismiss the bill with costs.

BENTON vs. POPE *et als.*

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1. A deed which gave to A certain slaves, to have and hold forever, the same to remain in the possession of B during his life without the right of disposition and without being subject to his creditors, vests the absolute legal title to the slaves in A.
2. Minors may maintain an action of trover by their next friend, but he is not entitled to receive the money recovered. It will be ordered to be paid into court, subject to the demand of a legally constituted guardian.

This is an action of trover for slaves, which was tried by Judge Maney, and a jury of Robertson county, and a verdict and judgment rendered for the plaintiffs. The defendant appealed.

Garland, Fogg and Boyd, for plaintiff in error.

Pepper, for defendants in error.

TURLEY, J. delivered the opinion of the court.

This is an action of trover, brought by the defendants in error, infants, under the age of twenty-one years, against the plaintiff in error; and their right to recover the property sued for, to wit, a negro man named Ben, depends upon the construction of the following deed of gift:

[Benton vs. Pope et al.]

"Know all men by these presents, that I, Wm. Pope, have this day given unto my grand children, Salina Pope, Mary Pope, and Sally Pope, heirs of Wm. W. Pope, my son, two negro men, one named Charles, about fifty years of age, and Ben, aged about forty, to have and to hold the same unto the above named children forever; the same to remain in the possession of Wm. W. Pope during his life, but not to be subject to his creditors, or liable for the payment of his debts, in any way whatever; and the said Wm. W. Pope is not to dispose of said negroes in any way or manner, either for his life, or any number of years. Given under my hand and seal, this 17th day of June, 1841.

"WM. POPE, [Seal.]"

Now, the question is, does this deed of gift, vest in Salina, Mary and Sally Pope, the absolute legal title, *in presenti*, to these negroes, or does it give a life estate to Wm. W. Pope, with remainder to his children?

We have no hesitation in saying, that the whole and exclusive legal title to the negroes, is vested by the deed in the plaintiffs, the grand children of the donor; and if the father has any interest whatever, under the deed, it is a mere equitable *usufruct*, subordinate to their legal title, not liable for his debts, and not available for any purpose in a court of law.

It has been suggested, that, perhaps, minor children cannot bring an action of trover by their next friend. But we know of no principle forbidding it. But we have held, that a *prochein amy* is not entitled to receive money coming to infants upon judgments obtained through him for them.

And we, therefore, affirm the judgment of the Circuit Court, and direct that the money, when collected, be paid into court, subject to the order of a legally constituted guardian of the infants, when such one shall appear.

THE STATE vs. SMITH.

1. When a word used in a statute has a fixed technical meaning, the legislature must be understood as employing it in that sense, unless there be something in the context, which shows it was intended to be used in a different sense.
2. To constitute a merchant, in the meaning of the revenue laws, the business of buying and selling should be the pursuit and vocation by which the party makes his living.

In this case there was a demurrer, which was argued before Judge Dillahunt, in the Circuit Court of Maury county, and judgment rendered for the defendant. The State appealed.

Attorney General, for the State.

H. Thomas, for the defendant.

GREEN, J. delivered the opinion of the court.

This is an action of debt to recover the penalty of five hundred dollars imposed, by the act of 1835-6, on merchants who may sell goods without a license.

The declaration has several counts, and states in substance, that the defendant being a retail merchant, did keep on hand and sell, and retail divers articles of goods, wares and merchandize, not being the growth or manufacture of this State, without having first obtained a license according to law therefor, contrary to the statute in such case provided, &c.

The defendant pleaded *nil debet*, and also pleaded six special pleas, all of which substantially state, that it is true, the defendant did sell the articles mentioned in the plaintiff's declaration, but said defendant is a school master, and is not a merchant, and said articles were sold only to members of his family; that defendant is the preceptor and proprietor of a female school, which consisted of one hundred and fifty girls or more, and twelve tutoresses as assistants; that of said pupils seventy-five resided with the tutoresses in the defendant's family, and said pupils and tutoresses were members of the defendant's family, and it was a part of the duty and contract of the defendant to furnish and supply the said tutoresses and pupils with every thing necessary for their several stations and em-

[The State vs. Smith.]

ployment, and the said several items of goods, shoes, books, &c. mentioned, were furnished to the said members of his family, according to said undertaking, not otherwise.

To these several pleas the plaintiff by the Attorney General demurred. The court overruled the demurrer, and discharged the defendant, from which judgment the State appealed to this court.

The act of 1835-6, ch. 13, sec. 5, provides, that every retail merchant, grocer, &c., who shall vend or sell in this State, any goods, wares and merchandize, &c., other than the growth or manufacture thereof, shall be subject to pay an annual tax of one hundred and fifty dollars, unless he shall make affidavit, that the amount of his stock of goods, &c. does not exceed \$3000, on which affidavit he shall pay a tax of twenty dollars to the Clerk of the County Court, who shall issue a license for one year.

The act then goes on to graduate the tax to be paid according to the capital employed, and requires that in each case the Clerk shall issue a license to the merchant.

The 16th section of the act provides, that if any merchant, &c., "shall carry on any of the aforesaid branches of business, without having first obtained license in accordance with the provisions of this act, he, she or they shall forfeit and pay to the State, the sum of five hundred dollars, to be recovered by action of debt in the Circuit Court.

The question raised by the pleadings in this cause is, whether the defendant is a merchant, within the meaning the revenue act of 1835. He is the preceptor and proprietor of an extensive female school, and had between fifty and an hundred persons (pupils and tutoresses) boarding with him and members of his family. To supply these persons with clothes, books, &c. he kept on hand a supply of such articles of clothing and stationery as they might need, and furnished these articles, not with a view of profit, but to accommodate his pupils and tutoresses, and to keep up and carry on his school. He sold to no person, not a member of his family.

The question whether the defendant is a merchant or not, must depend upon the technical signification of that term. For

[The State vs. Smith.]

when a word used in a statute has a fixed technical meaning, the legislature must be understood as intending to employ it in that sense, unless there be something in the context, which indicates an intention to use it in a different sense. But there is nothing in this act that indicates any such intention. The word "merchant" is frequently employed in this statute, and always to indicate a person whose vocation was understood and well defined.

Tomlin's Law Dictionary, vol. 2, title Merchant, defines the term to mean, "one who buys and trades in any thing, and as merchandize includes all goods and wares exposed to sale in fairs or markets, so the word merchant formerly extended to all sorts of traders, buyers and sellers. But every one who buys and sells, is not at this day under the denomination of a merchant; only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by a continued assiduity, or frequent negotiation in the mystery of merchandizing, are esteemed merchants."

From this definition it seems, the business of buying and selling should be the pursuit and avocation of a party, by which he makes his living, in order that he shall be regarded as a merchant. The English bankrupt laws apply to persons "who use the trade of merchandize." But a school master who purchased shoes, books, &c., and sold them to his scholars at a profit, was held by Lord Kenyon, not to be a trader within those laws. 3 Petersdorf's Ab. 414.

We think the sense in which the legislature used the word "merchant" in the act under consideration, is correctly exemplified in the authorities above referred to, and that the defendant is not a merchant liable to the penalty of the act.

The demurrer to the pleas was properly overruled, and we affirm the judgment.

PURYEAR vs. THOMPSON.

The master is liable for injuries done by his servant whilst in his employment arising from negligence, but is not liable for torts: *ex gr.* if an overseer receive a cowhide from his employer, with directions to whip a slave till he be humbled, and the overseer inflicted blows on the slave so negligently and recklessly as to produce his death, the employer would be liable for the value of the slave. It is otherwise where the overseer abandoned the directions of his employer, and maliciously and intentionally killed the slave.

This is an action of trespass on the case, which was tried by Judge Maney and a jury of Williamson county, on the plea of not guilty, at the March term, 1844. A verdict and judgment were rendered in favor of the plaintiff for the sum \$443 45 damages, the estimated value of the slave. The defendant appealed.

All the facts are stated in the opinion of the court.

J. Marshall and A. Ewing, for the plaintiff in error.

They cited Story on Agency, 474, 470, 475: Story on Bailments, 266: 7 Yerg. 367: 2 Hump. 554: 1 East, 106.

Alexander, for the defendant in error.

He cited *Wilkins vs. Gilmore*, 2 Hump. 240: 1 Iredell L. R. 240: 6 English Com. Law Rep. 529: 3 Hump. 466.

GREEN, J. delivered the opinion of the court.

This is an action on the case, to recover the value of a negro boy, who was killed by the overseer of the plaintiff in error, whilst inflicting punishment for an offence.

Thompson, as guardian of some minors, hired the boy Harry to Puryear for the year 1842. The negro was employed to work in Puryear's factory, where one Newcomb was his manager and overseer. Some time in July a difficulty occurred between the negro and Newcomb, when Newcomb attempted to chastise the negro, who ran away, and did not come home until the next Monday morning. About nine o'clock, Monday morning, Puryear had the negro tied and commenced whipping him with a cowhide, and after striking him eight or ten

[Purveyor vs. Thompson.]

licks, he handed the cowhide to Newcomb, telling him "to give the negro a good whipping—be sure to humble him before you let him down, and then put him to work, for he has had his own way long enough." Newcomb took the cowhide and commenced whipping the negro, when Puryear left and went to a place in the neighborhood. Several hours after Puryear left the factory, he was informed that the boy Harry was dead. He immediately went home, expressing much regret, and on his way met Newcomb, who admitted the negro was dead, and said "he had whipped the negro too much, and was sorry for it." The negro was found lying in the factory dead; and appeared to have been severely whipped, and there were bruises on his head and neck, as though they had been made by a piece of timber which lay near, three inches wide at one end, and tapering to the other end, and upwards of an inch thick. Newcomb, previously to this transaction, had treated the negroes humanely, and had a good character.

The court charged the jury in substance, that an overseer for hire, was to be regarded as a servant; that a master was responsible in many cases, for the acts of his servants, but that he was not responsible for the torts of the servant, committed without his authority; that it is lawful to chastise a slave, but that the hirer of such slave is bound to use ordinary care and diligence in the infliction of such chastisement, and that his responsibility is the same, whether he inflict the punishment himself, or trust his overseer to inflict it; "that if a hirer order his servant or overseer to punish a slave, until the slave be humbled, and then put him to work, and the overseer is to decide when the slave is humbled, although the master may indicate, by handing a cowhide to the overseer, that the cowhide is to be the instrument of correction, yet if the overseer begin the punishment with the cowhide, and in its progress suffer his passions, to get the better of his judgment, and even lay aside the instrument of correction, intended by the master, and use another instrument, which may produce death, and which the jury may believe did produce death, still the hirer would be answerable to the owner for the value of the slave."

The counsel for the defendant, requested the court to charge

[Puryear vs. Thompson.]

the jury, "That if they believe the defendant tied up the negro and commenced whipping him, and after striking a few licks with a cowhide, handed the same to the overseer, and told him to whip the negro until he was humbled, and then put him to work, and if they further believed, that so soon as the defendant left the place of punishment, the overseer abandoned all intention of complying with his master's orders, and undertook to gratify his own malice and spite against the negro, and in the gratification of this malice killed him, then the defendant would not be liable."

The court declined giving the charge asked for, on the ground, that it was an abstract proposition, and that there was no evidence to which a charge of this character would apply.

The jury found a verdict for the plaintiff, and the defendant moved for a new trial, which being refused by the court, he appealed to this court.

No principle of the common law, is better settled than that a master is liable for the injuries done to others by his servant's negligent conduct while in his employment. And it is equally well settled, that he is not liable for his servant's torts or wilful acts done without his authority. Story on Agency, 474, same, 470 note, 475 note: Story on Bailments, 266: 7 Yerg. R. 367. And it can make no difference, whether such wilful act of the servant be done while he is in the performance of some lawful service required by the master, or be entirely disconnected with such service. As if in driving the master's carriage, by his order, along the highway, he drives so negligently as to injure another person, the master is liable; but if while thus driving, the servant wilfully, and contrary to his master's direction, so drive as to injure another, intending to inflict such punishment, the master is not liable. So in the case before us, if the overseer in pursuance of the defendant's directions, intended only to chastise the negro until he should be humbled, and in the attainment of that object, so negligently and recklessly inflicted blows, and so used instruments of punishment, as to take the life of the negro, the defendant below is liable for the injury. But if he abandoned the purpose to chastise until the negro should be humbled, and employed instruments of torture to gratify his

[Bailey & Cochran vs. Cooper et als.]

malice, intending to kill the negro, in such case the defendant would not be liable.

We think these propositions were not placed before the jury, by the charge of His Honor, so as to leave them free to determine from the evidence, whether the blows by which the negro was killed, were intended by Newcomb to take his life, or whether in his purpose to humble the slave, at all events, he grew negligent and reckless of the means he employed, and thereby killed him, not having intended that result.

Reverse the judgment, and remand the case for another trial.

BAILEY & COCHRAN vs. COOPER et als.

1. The payee of a note, who endorses it over, is a competent witness to prove in behalf of the maker, that the note was not assigned in due course of trade.
2. An objection by a defendant in Chancery, to the testimony of a co-defendant, may be waived, by the mode of his cross-examination of such defendant.

Cullom and Hart, for complainants.

Caruthers, Guild and Meigs, for defendants.

REESE, J. delivered the opinion of the court.

In September, 1839, Bailey & Cochran purchased of Lyon & Stephenson, a league of Texas land, lying on Red river, and on the 5th day of October, 1839, executed under seal, to Lyon & Stephenson, then citizens of the State of Georgia, Habersham county, four bills single, three of which, were on the 12th of the same month, 7 days after, assigned to defendant, Mark A. Cooper, having upon one of them a credit of \$400. It turned out, that the title to said land was spurious and founded upon forgeries. Cooper obtained judgments upon said notes, in Smith county Circuit Court, against the complainants, where they resided.

This bill is filed to enjoin the collection of said judgments,

[Bailey & Cochran vs. Cooper et als.]

and alledges the failure of the consideration, and that the bills single were not assigned to Cooper in the due course of trade, and for a valuable consideration, but as collateral security for advances made by him to Lyon & Stephenson towards the purchase of the same Texas lands of the said Lyon & Stephenson. The defendant in his answer denies this, and asserts, that he advanced two thousand dollars for the notes, and took an assignment, and that he did this on the credit of the makers, for he knew the endorsers to be insolvent.

The deposition of Stephenson is taken in the cause; he testifies, that on the day the assignment bears date, he and Lyon sold to Cooper the one-half of twenty-two leagues of Texas land lying on Red river, being a part of the same land sold to Bailey & Cochran, and that towards the payment for the said land, Cooper advanced to them the sum of \$2,000, and as collateral security for said advance, Cooper took from them the three notes in controversy, and a note for \$500 on John C. McLemore & Burke, of Nashville, and the title bond for the one-half of a lot of land in Habersham, the whole of which lot was worth \$750, and they took from him a bond to return to them those securities at Nacogdoches, in Texas, if the titles to the land turned out to be good, to which place he was to accompany them shortly thereafter, and, when, in the event referred to, he was to pay a further instalment upon the said purchase; that he did accompany them to Texas, where they found the titles to be forgeries; and that after their return to the State of Georgia, they paid him \$260, according to the original agreement, as extra interest upon the advance of this \$2,000.

This statement is corroborated by the deposition of Mr. Meigs, to whom Cooper transmitted, by mail, the note of McLemore and Burke for sale or collection. The competency of Stephenson as a witness, has been the main point in the cause here. His competency as relates to his attitude of endorser, a fruitful topic of judicial controversy in England and elsewhere, we regard as having, in Tennessee, and most of the American States, been long settled in favor of the competency of a witness so situated. His competency on the ground of interest, is, perhaps, unassailable; because, if his liability as endorser

[Bailey & Cochran vs. Cooper et als.]

has been fixed, the contrary of which is not shown, and is not to be presumed, his interest is equal in the case.

His competency as a party to this suit would have presented more difficulty, if there had not been a cross-examination, and one too of the peculiar character which the record exhibits. That cross-examination is by the defendant himself; the interrogatories are pregnant with assertion, statement and narrative. We learn from them, independently of the deposition, that on the day of the assignment, there was a provisional trade for Texas lands, on account of which Cooper was to go, and did go, with Lyon & Stephenson to Texas; that the note on McLemore and Burke, and the title bond for the Habersham lot of land were deposited with Cooper, the interrogatory says, as collateral security to the assignment; that he did receive on their return to Georgia \$260, in part for extra interest on the \$2,000, a very natural matter, if the \$2,000 were advanced for the Texas land, and the notes were collateral; but inexplicable, if the \$2,000 were given absolutely for the notes. In short, if the deposition were rejected for incompetency, there is matter enough in the interrogatories to sustain the decree, but the cross-examination, and the mode and manner of that cross-examination, remove whatever difficulty, if any, may exist on the subject of Stephenson's competency. Cooper examines him as to every point of his deposition, and himself by his own interrogatories, brings out from the witness, the additional and conclusive fact, that Cooper had given his bond to Lyon & Stephenson, to restore the securities deposited, in the event the land titles in Texas should prove to be good. This fact, of itself, would be conclusive, that the notes were not absolutely assigned in the course of trade.

When a party, by his cross-examination, brings forward such testimony, he cannot escape from its effects, by objecting to the competency of the witness, as was held by this court in the case of *Stump vs. Crutcher's ex'r*.

Upon the whole, we are satisfied that the Chancellor's decree ought to be affirmed.

PHILLIPS vs. ALDERSON.

A notice to an endorser is good, if delivered in due time at his residence, or at his usual place of doing business.

This is an action of assumpsit, brought in the Circuit Court of Maury county, against Philips, an endorser of a promissory note.

The case was tried by Judge Dillahunt, and a jury of Maury county, on the plea of non-assumpsit, and a verdict and judgment rendered in favor of the plaintiff, from which the defendant appealed.

Voorkies, for plaintiff in error.

S. D. Frierson and Cooper, for defendant in error.

TURLEY, J. delivered the following opinion of the court.

Lemuel Phillips was sued as endorser of a bill single. The proof shows that he resided near the town of Columbia, Maury county, Tennessee; that he had a tan-yard in the town of Columbia, and was also a partner in trade with one Beasley in the grocery business, in the same town; that he gave his personal attention both at the tan-yard and the grocery store. The protest of the Notary Public shows, that the notice of the dishonor of the bill single was left in due time for the endorser Phillips, at the grocery store of Beasley & Phillips. And the question is, whether this is a good notice?

We are of opinion, that it is. Mr. Story, in his Treatise upon Bills of Exchange, sec. 279, says: "If the notice is to be given to a party in or near the place of the dishonor of the bill, and it is not sent by the general post, it should be sent to, or given at his place of domicil, or his place of business, and either will be sufficient." See sec. 300, and note 3, p. 331, and the numerous authorities there referred to. We think the same principle applies, when an endorser has several places of business, and notice is left at any one of them.

We, therefore, affirm the judgment of the Circuit Court.

HELM et als. vs. FRANKLIN et als.

A tenant in common is entitled, as matter of right, to partition, and whenever partition cannot be made without serious injury, he is entitled to a sale in order to effect a partition without injury.

This is a bill filed for a sale of real estate and partition of the proceeds. It was tried by Chancellor Bramlitt on bill, answers, replication and proof. He decreed a sale and partition, from which the defendants appealed.

S. D. Frierson, for complainants.

Wright and Thomas, for defendants.

GREEN, J. delivered the opinion of the court.

The parties to this cause, plaintiffs and defendants, are tenants in common of the Eagle Hotel property, in the town of Columbia. This bill is filed under the act of 1829, for a sale of said property, and partition of the proceeds thereof, among the owners of the estate.

The defendants resist the sale and alledge, that it is for the interest of the parties, that they continue to hold, and derive from the rents of the property the income it affords.

The evidence shows, that the property affords to its owners a fair income for the capital vested in it; and that it is probable the interest of the owners will not be promoted by a sale and partition thereof. But the evidence shows, that the property is of such a description, that partition without a sale cannot be made, and that if it be divided, it is manifestly for the advantage of the parties, that it be sold in order to effect such division.

The question then is, are the complainants entitled to partition as matter of right, and if so, have they a right to require a sale of the property for that purpose?

That a tenant in common, is entitled, as matter of right, to have partition of the estate, is not seriously controverted. See on this subject, *Collins vs. Dickerson & Allen*, 1 Hay. Rep. 240, and *Winby vs. Findley and others*, 3 Rand. Va. Rep. 361.

But it is insisted, that it is discretionary with the court, whe-

[Helm et al. vs. Franklin et al.]

ther a sale shall be ordered or not, and that in this case it is not for the interest of the parties, that there should be a sale.

We answer, that the discretion which, by the acts of 1827 and 1829, (C. & N. 516-16,) the court possesses, is not whether there shall be a partition, but whether in making this partition "the property can be equally divided among those entitled thereto, or that it would be manifestly for their interest that it should be sold."

The evidence in this cause, going to establish that it would be for the interest of these parties to continue tenants in common, is not relevant to any question for the decision of the court. By the common law, a tenant in common has a right to partition; and by the statute, wherever that right exists, he has a right to require a sale of the estate, in order to such partition; provided it shall appear to the court, that the "property cannot be equally divided among those entitled thereto, or that it would be manifestly for their interest, that it should be sold."

The meaning of this latter expression, is, that if it is manifestly for the interest of the parties, in order to make partition, that the estate be sold it shall be so ordered.

This act of assembly has not changed the rights of the tenants in common, in reference to partition, except where an equal division cannot be made, or where it effects a division, it would be manifestly for the interest of the parties, that a partition should be made of the proceeds of the sale, and not of the estate itself.

The proof clearly shows, that the property in question cannot be equally divided among those entitled thereto; and, therefore, it must be sold, in order that partition be made.

Affirm the decree.

ROLLMAN, adm'r. vs. BAKER, WEST et als.

Where a note was made payable one day after date, and an agreement was subjoined, that suit should not be brought on it, so long as the maker was believed to be solvent, such agreement could not be regarded, either in point of intention or legal effect, as barring the right to interest.

Venable and Turney, for complainants.

Taul, for defendants.

REESE, J. delivered the opinion of the court.

This case comes up on exceptions to the Master's report below. And there is but one question in it: that is, whether in taking the account, the Master properly allowed a note of two hundred dollars, given by the intestate, Henry Rollman, in his lifetime to Jacob Rollman, and whether it was proper to compute interest on the same. Upon the evidence in the record, we are not at liberty to hold, that the note in its origin was fraudulent, and did not bind Henry Rollman; or that it was barred by the statute of limitations, applicable to administrations. Because there is proof of a demand in time, and of delay at the special request of the administrator till the occurrence of a specified event. As to interest, the note was made payable, by its terms, one day after date, and the subjoined agreement, that suit shall not be brought upon it, while the payee believed the maker to be safe, cannot be construed, either in point of intention or legal effect, so as to prevent the computation of interest, upon the note due by its terms, and the contract of the parties.

It would have been competent, at any time, for the maker to have paid it, and thus have prevented the accumulation of interest.

The decree will, therefore, be affirmed.

TURNERY vs. STATE BANK *et al.*

1. Usury is an illegal and corrupt agreement, whereby more than six per cent. is taken for the loan of money, or the forbearance of debt.
2. The exchange of bank notes under par, for specie or Eastern funds commanding a premium, is usurious, if the object and intent of the parties to the exchange be to cover a loan of money at more than six per cent.: otherwise it is not.

This bill was filed in the Chancery Court at Sparta, against the State Bank and Jenkins, by Samuel Turney. It was tried by Chancellor Ridley, on bill, answer, *pro confesso* judgment and proof. The Chancellor gave a decree in favor of the complainant, from which the Bank appealed.

All the material facts are stated in the opinion of the court.

H. M. Burton, for the complainant.

G. W. Gibbs, for the Bank.

REESE, J. delivered the opinion of the court.

The complainant was the endorser of a promissory note made by Jenkins, and payable at the Bank, upon which he has been sued by the Bank, and a judgment has been recovered against him; and he files this bill, alledging that the Bank is indebted to Jenkins on the ground of money received and retained by the Bank from Jenkins, in a series of transactions with him, to an amount much exceeding that of the note of complainant, upon which the Bank has obtained judgment; and the bill prays an account of such usurious transactions, and of the amount equitably due thereon from the Bank to said Jenkins, to the end, that the same may be applied to the satisfaction and extinguishment of said judgment. The facts out of which the allegation of usury is attempted to be established, are, as it appears from the answer of the Bank and the proof in the case, as follows:

Jenkins was for a number of years a Contractor with the General Post Office, for carrying the mails of the United States in stage coaches, and in that business was in the habit of receiving from time to time, a considerable amount of eastern

[Turney vs. State Bank et al.]

funds, in the shape of post office checks, and otherwise, and of gold and silver; and during the same time, he needed still larger amounts, than these receipts, of money current within the State, to meet his engagements. In this state of things, he made an arrangement with the Bank, by which it was agreed, and understood between them, that for whatever sums of gold and silver or eastern funds he would from time to time deposit with the Bank, he might immediately check for and receive in the notes of the Bank or of other Tennessee banks, and in addition, he should have the privilege of borrowing from the Bank, in their own notes or in the notes of other Tennessee banks, the like amount, upon giving his note with satisfactory endorsers, like other customers.

By this arrangement he had the power to receive in Tennessee money twice the amount of his funds; and the Bank had the power, without rashness, to enlarge the line of its discounts, because it was not probable, that more than one-half of the notes issued by them, would in any short time return to their counters, to be taken up by them. In this way, at various times the Bank received from Jenkins in post office checks \$5,383 94, in United States bank paper \$100, and in silver \$4,368 98, making in all \$9,852 92: \$1,443 92 of this aggregate was applied to discounts upon renewal of other notes that Jenkins had in bank, and the balance was disposed of as above. During the time of these transactions, the difference between specie and eastern funds, and Tennessee bank notes was 7 or 8 per cent. or more on an average. Out of these transactions Jenkins became indebted to the Bank to the amount of \$2,600, and is largely indebted to the Bank on other accounts. Upon this state of the facts, there are two most obvious grounds, upon which the prayer of the plaintiff, for relief, must be refused.

These are, first—that there does not appear to be any usury in the case; and, secondly, If there were, the Bank in point of fact, is not indebted to Jenkins upon that or upon any other ground; but on the contrary, Jenkins is largely indebted to the Bank. 1st. There is no usury in the case. Usury is an illegal and corrupt agreement, whereby more than six per cent. is

[Turney vs. State Bank et alia.]

taken or received for the loan of money, or the forbearance of debt.

The money loaned by the Bank to Jenkins was on the same terms, as to others. He received the Tennessee bank notes, and he gave his notes with endorsers to secure the repayment, and in these securities no illegal interest was taken or received. He borrowed, and he paid precisely as did others. In what did the usury consist? It is said, because he deposited specie and eastern funds, and checked for the nominal amount in Tennessee notes, when he would have been entitled to a premium. That was his own affair. The notes received for his checks, were notes of specie paying banks, as sound or available, perhaps, to him and to others, in ordinary transactions, as eastern funds. He chose to let them have his funds on such terms, to enable them consistently with prudence and policy, and maintenance of their credit, to extend to him larger discounts, and, perhaps, upon slender security, than, according to their usual course of business, they would have extended to others. Such arrangements are hazardous to banks, and they are apt in the end, as in this case, to lose by them. But it is clear that it was not the intention of either of these parties, by any shift or device, to cover up and conceal usury. If so, it would be usury to exchange Tennessee bank notes at par for eastern funds, or to receive, upon securities given for their notes, such funds at par.

This case bears no resemblance to the case of *Lanier vs. The Nashville Bank*, and that case, among the class to which it belongs, goes farther than the case that goes farthest. That case, however, is correctly decided, if the object and purpose of the parties were to cover over an usurious transaction, with the forms and appearances of a sale of the notes; otherwise not.

In the elaborate opinion of the Supreme Court of the United States, in the case of *The Bank of the United States vs. Wagoner et als.* 9th Peters, 378, Mr. Justice Story, who delivered the opinion of the court, maintains, on the subject of usury, the following principles: That in construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury within the prohibition of the

[Turney vs. State Bank et al.]

law, there must be an intention, knowingly, to contract for, and to take usurious interest, for if neither party intend it, and act *bona fide* and innocently, the law will not infer a corrupt agreement. Again, he says, speaking of that case, there has been no taking of usury, and no reservation of usury on the face of the transaction. The case then resolves itself into this enquiry, whether upon the evidence, there was any such corrupt agreement, or device, or shift, to reserve or take usury, and none of these appear in the case. Again, in that case, it is held, because an article is depreciated in market, it does not follow that the owner is not entitled to demand or require a higher price for it before he consents to part with it. He may possess bank notes, which to him are of par value in payment of his own debts, or in payment of public taxes, and yet their marketable value may be far less. If he uses no disguise; if he seeks not to cover a loan of money, under the pretence of the sale or exchange of them, but the transaction is *bona fide*, what it purports to be, the law will not set aside the contract, for it is no violation of any public policy against usury. See also on this subject, 10 Mass. R. 284, and 19 John. R. 496. It seems to us, that these general views and principles are applicable to this case, in which there is neither usury upon the face of the transaction, nor any evidence that the parties did not act *bona fide*, and without any purpose, by shift or device, to cover over an usurious transaction.

2d. But in the second place, if there had been usury in the transaction, the evidence is abundant to establish, that Jenkins in those very transactions, is largely indebted to the Bank, as well as on other transactions, and there is no principle of law or of equity which will countenance for a moment, under such circumstances, the relief in the bill prayed for. This is too plain to admit of argument or illustration.

Upon both grounds, therefore, we must reverse the decree of the Chancellor, dissolve the injunction, and dismiss the bill with costs in this court and in the Chancery Court.

FARRAR vs. BRIDGES.

No formal or ceremonious delivery of a deed of conveyance is necessary: if no condition be annexed and nothing remains to be performed in order to give effect to a deed of conveyance, its signing, sealing and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor.

This bill was filed in the Chancery Court at Columbia by Farrar against Bridges, to compel Bridges to deliver up a deed of conveyance for a tract of land which the bill charged had been signed, sealed and delivered by defendant to complainant. The defendant denied that the deed had ever been delivered, but alledged that it had been retained, by agreement, to secure to the defendant the payment of certain sums of money which complainant owed him.

The answer insisted that the deed had been delivered.

The case was tried by Chancellor Bramlitt, at the September term, 1843, on bill, answer, replication and proof.

He was of opinion that the deed had been delivered, and decreed for complainant.

The defendant appealed.

S. D. Frierson, for complainant.

Complainant insists upon the following points:

1st. A ceremonious or formal delivery need not be shown.
7 Greenleaf's Rep. 184; 1 John. R. 250.

2nd. It is not necessary that the maker should have transferred the possession of the instrument. 8 Dowl. & Ryland, 348; 5 Barn. & Cress. 671; 1 John. Ch. Rep. 329; Conn. Rep. 111; 1 John. Ch. Reports, 240; 15 Wend. 545.

3rd. "If both parties be present, and the usual formalities of execution take place, and the contract is to all appearance consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be kept in the custody of the grantor." 4 Kent's Comm. 455 and 456; 1 Johns. Ch. Rep. 240.

Nicholson and Houston, for defendant.

[Farrar vs. Bridges.]

REESE, J. delivered the opinion of the court.

The bill alleges, that on the 8th day of November, 1841, the complainant purchased a tract of land of Samuel M. Farrar, containing 160 acres, and took a deed therefor, which is duly registered and a copy exhibited; that previously to this conveyance the bargainor had purchased the land from the defendant Oliver W. Bridges, had paid him the consideration therefor, and had obtained a deed duly executed and witnessed, but that the defendant had repossessed himself of the deed and refused to deliver it up to the complainant; and the bill prays that he be compelled to surrender the deed, in order that it may be proved and registered. The answer admits the sale of the land by the defendant to the said Samuel M. Farrar, the payment to the defendant by said Samuel M. of the consideration, the preparation of a deed, its signature and sealing, and the due attestation of witnesses, but denies that any delivery of the deed took place; states that the deed remained in his possession, and that after it had been some time thus in his possession he was told by the bargainor Samuel M. Farrar, that he might retain the possession of the paper to indemnify him for the bargainee's indebtedness to him, and for defendant's liabilities for the bargainee, which indebtedness and liabilities are set forth in the answer. The attesting witnesses prove, that one of them was called on to write the deed, and that both witnessed it at the request of the parties, they being both present; and that after witnessing the execution of the instrument, they took their leave, the paper lying on the table; that they understood that the contract of sale had previously taken place, and the deed which they had witnessed was the final consummation of the matter. The testimony of these witnesses does not establish, indeed, any formal or ceremonious delivery: such delivery is not necessary, and does not very often take place. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing and attestation as a valid instrument between the parties, will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor.

[Farrar vs. Bridges.]

The defendant, in his answer, when denying the delivery of the deed, must mean merely that no formal or ceremonious act of delivery took place; for the answer does not pretend to allege that the omission of such formal and ceremonious act, or the retention of the instrument by the defendant, at the time, was because of any condition to be performed, or thing to be done, which by the agreement of the parties was necessary in order to render the deed effectual.

Nothing of this sort is stated. On the contrary, the defendant in his answer, states, that "at the time the paper was written, signed, &c, respondent had no registered deed for the land. It was the purpose of respondent, when he got the deed of conveyance for said land to respondent, to acknowledge the paper writing to convey said land to said Samuel M. before the Clerk of the County Court of Maury and let it be registered also."

That such was his purpose as completely establishes that no act whatever remained to be done to make the execution of the deed valid and effectual, as if he had the candor to state, which was no doubt the fact, that the instrument was left with him by the said Samuel M. for the purpose of being acknowledged by him, and registered.

It could not have been his purpose so to have treated the instrument, if any thing remained to be done on the part of the the said Samuel M. to make it valid and effectual; to which, indeed, the defendant makes no pretence whatever.

The answer of the defendant, thus explained, as well as the proof of the attesting witnesses, establishes the fact that the deed in question was properly and sufficiently executed. This being the fact, the subsequent pretended parol mortgage by the said Samuel M. to the defendant, authorizing the latter to retain the instrument for his indemnity, could have no effect, even if proved; but of such an agreement, any more than of the existence of the indebtedness and liabilities which it was to indemnify, there is no proof whatever.

Upon the whole, then, it is very clear that the decree of the Chancellor ought to be affirmed.

McGUIRE vs. CARUTHERS' adm'r. et al.

1. The allegation of matter fit for the cognizance of a chancery court, which is not proved, will not give such court jurisdiction of matters belonging to a court of law.
2. The answer of defendant without objection to the jurisdiction of the court, does not waive the objection in cases where the questions involved belong exclusively to courts of law.

This case was tried by Chancellor Cahal, on bill, answer, replication and proof, in the Chancery Court at Columbia. He gave a decree in favor of the complainants.

The defendant appealed.

Nicholson, for complainant.

Humphreys, for defendants.

GREEN, J. delivered the opinion of the court.

The bill alleges, that on 1st of September, 1836, David Looney executed a note signed David Looney & Co. to John Caruthers, 2140 dollars 34 cents, and payable 1st of January, 1837.

John Caruthers had died, and the defendant is his administrator. Suit has been instituted in the Circuit Court of Maury county against said Looney and complainant. Complainant was not the partner of David Looney at the time the note was executed, which was well known to the said John Caruthers at the time the note was made. The bill states that a large amount of the said note is usurious. The bill also states, that the said David Looney & Co. have claims and accounts which they are entitled to set off against said note. It prays for an injunction against the further prosecution of the suit at law, and for general relief.

The defendant filed an answer to the bill; proof was taken, and the cause was brought to hearing on its merits.

The Chancellor was of opinion, that the complainant was not a partner of Looney at the date of the note, and that the obligee in said note, John Caruthers, knew, at the time he took the

[McGaire vs. Caruthers' adm'r. et al.]

note, that the complainant was not a member of the firm of David Looney & Co.; and thereupon he decreed a perpetual injunction. The defendant appealed to this court.

The question now is, had the Court of Chancery jurisdiction of this cause? It is insisted, that the jurisdiction can be maintained because the bill alleges the contract to be usurious; that it has jurisdiction to enquire into the usury, and having jurisdiction for one purpose, the court will retain the same generally.

It is true, that a court of chancery, having jurisdiction for one purpose to afford relief, will retain the cause generally. But the mere statement, in the bill, of facts, upon which the jurisdiction might be maintained, but which are not proved, and upon which no relief is decreed, will not authorize a decree upon such parts of the bill, as if standing alone would not give the court jurisdiction: much less will the statement of a ground of relief directly contradictory to the grounds of the decree, justify such assumption of jurisdiction.

If the question of jurisdiction were to depend upon such statements in a bill, it would be easy always to evade the objection to the jurisdiction, and force upon courts of equity the cognizance of questions most unfit for their jurisdiction.

In the present case, the question of usury and the question whether the complainant was a partner of David Looney, are wholly incompatible. Before the question of usury can be enquired into, we must assume that the complainant is bound as a party to the note. But the decree pronounces that he was no partner, and consequently excludes the relief for usury; leaving the bill, so far as the question of jurisdiction is concerned, as though the statement about the usury had not been made.

2. But it is said the defendant failed to demur, but answered the bill, and brought the cause to hearing on the merits, and that he cannot now object to the want of jurisdiction.

It is certainly true, that a defendant may often, by answering a bill, waive objections of which he could have availed himself by demurrer. As if he fail to demur for mutifariousness, as in the case of *Hinton & Marr vs. Cole*, (3 Hump. 356,)

[McGuire vs. Caruthers' adm'r. et al.]

he waives the objection. So if there has been a trial at law, and the party failed to avail himself of a defence, of which equity, but for the trial at law, would have had jurisdiction.

The objection to the jurisdiction of a court of chancery, on account of the trial at law, is waived if the defendant to the bill answer, and bring the case to hearing on the merits.

It is to these, and such like cases, to which the principle insisted on in the argument of the complainant's counsel applies. But where the subject matter is unfit for a court of equity, and in its nature of exclusive cognizance in court of law, the answer of a defendant has no effect upon the question of jurisdiction.

This principle was strongly stated by this court, in the case of *Hickman vs. Cooke*, (3 Hump. 643,) where the court say, "The admission of a party in a suit is conclusive as to matters of fact, or may deprive him of a privilege which, if insisted on, would exempt him from the jurisdiction of the court, but no admission of parties can change the law, or give jurisdiction to a court, of a cause, of which, by the law, it has no jurisdiction." 6 Bro. Parl. Cases, 575.

In view of these principles, the question recurs, did the Court of Chancery err in entertaining jurisdiction of this bill? And we think most clearly it did.

Stripped of the question of usury, which we have seen, is contradictory to the relief granted, and can give it no aid, the case presents a simple question, whether the complainant was a partner of David Looney; and if he was not, whether the payee in the note was not apprised of that fact when the note was executed.

It is difficult to conceive of a case more peculiarly appropriate for the investigation of a jury, or one more remote from any known head of equity jurisdiction.

The bill must be dismissed without costs, and without prejudice.

MARABLE vs. R. and J. JORDAN.

Where the wife dies without issue the husband has no claim against those who inherit her real estate for the value of improvements placed on it, though made with her assent and approbation.

This bill was filed in the Chancery Court at Clarksville by Marable against Robert and John Jordan.

The bill alledges, that on the 22nd day of February, 1842, he intermarried with Mary W. Jordan; that she was seised and possessed of a tract of land lying on Cumberland river, containing two hundred and twenty-three acres; that it became necessary to erect a dwelling-house thereon for his residence, and that he did procure the erection of a valuable dwelling-house thereon, which made the said tract of land the more valuable to the extent of such outlay; that in about eleven months after the marriage the said Mary his wife died without issue, leaving brothers John and Robert; that said John and Robert demanded the land of him, which he was willing to surrender on payment of the sum of money which he had expended in the improvement of the place; that said Robert and John had thereupon instituted an action of ejectment against him in the Circuit Court of Montgomery county, &c.

The bill prays an injunction and an account, &c.

The defendants demurred to the bill.

The demurrer was argued before Chancellor McCampbell, at the March term, 1844.

He dismissed the bill, and complainant appealed.

Garland and Meigs, for complainant.

Fogg and Boyd, for defendants.

REESE, J. delivered the opinion of the court.

The wife of the complainant in her lifetime was the owner in fee of a tract of land. Upon this tract the husband made considerable improvements, adding to the value of the estate.

[Marable vs. R. & J. Jordan.]

The wife died without giving birth to a child; so the complainant did not become tenant by the courtesy.

He files this bill against the defendants, the heirs at law of the wife, to be allowed, and to obtain a decree for the amount of amelioration upon the estate made by him.

The counsel for the complainant insists that he is entitled to it upon principles of natural and general equity, as having conferred upon the defendants a benefit which they ought not, in conscience, to receive and enjoy without remuneration. He argues, that if the improvement had been made upon the lands of any other owner than a wife, with the contract, consent and acquiescence of the owner—or if even a wife had a trustee, by contract with such trustee—then his claims for compensation would be maintainable, as falling within the principle of decided cases: and that the sustaining principle of such cases applies also to this, namely, that it is against conscience for the owner to receive and enjoy a substantial benefit, created *bona fide* at the expense of another, without remunerating him for such expense.

Without enquiring to what extent, or upon what principle compensation would be allowed, or whether in some of the supposed cases it would be allowed at all, we remark that this case differs from the others above stated, in the controlling fact that the wife could make no contract, could give no consent, could be affected by no acquiescence; because, by an elementary principle of the common law, which a court of chancery cannot abrogate, the legal existence of the wife is merged in, and incorporated with that of the husband.

It results from this principle, that if the husband wish to improve the real estate of the wife before he is tenant by the courtesy *initiate*, he must risk the continuance of her existence or the birth of a child, to indemnify him for his expenditure.

The Chancellor's decree sustaining the defendant's demurrer and dismissing the bill, must be affirmed.

SIMPSON *vs.* TURNEY.

A notice given by the holder of a promissory note to the second endorser too late to fix his responsibility to the holder, will not avail the third endorser, though in due time, if given by him to the second.

Gibbs, for Simpson.

H. M. Burton, for Turney.

REESE, J. delivered the opinion of the court.

The Branch Bank of the State of Tennessee was the holder of a promissory note, payable at said bank, made by James H. Jenkins, to Anthony Dibrell, and endorsed in the following order: A. Dibrell, S. Turney, and Jno. W. Simpson. Turney's residence is within one mile of the Bank at Sparta, so known to be to the Bank and to all the other parties to the note. The note was legally due on the 1st day of February, 1843, that being the third day of grace. It was on that day protested. On the 2nd day of February no notice of the protest for the non-payment of the note was either served upon Turney personally or left at his residence. He had notice from the Bank, the holder, on the 3rd day of February. John W. Simpson, the plaintiff, the immediate endorser of Turney, gave him no notice whatever.

These facts being specially found by the jury in the case, the Circuit Court gave judgment for Turney, and the plaintiff has appealed in error to this court.

It is not insisted for the plaintiff here, that the notice of the Bank to Turney, the only notice he received, was in time. But it is urged, that if Simpson had given him notice on the day he received notice from the Bank, such notice would have been good; and that is certainly so: and the plaintiff further insists, that the notice given by the Bank shall inure to his benefit. If the notice had been in time and valid, it would by law have inured to his benefit, he being an intermediate party. But a notice of no benefit to the Bank, because not fixing the liability of the party notified, cannot inure to the

[*Simpson vs. Turney.*]

benefit of another. So to hold, would be to introduce a new principle into the law merchant. Suppose there were ten endorsers upon a note: if the holder ten days after the protest gave notice to the first endorser, this, according to the argument, would fix all the endorsers, for it would be just the time necessary to them to have given notice to each other successively.

It is perhaps a universal principle, where substitution exists at all, that the matter or thing to be substituted to must be valid and effective in behalf of the principal; if it be ineffectual in his behalf, it is difficult to see how it can inure to the benefit of others.

Upon the direct question raised in this case, Baily on Bills expressly says: "Nor is it any excuse, that there are several intervening parties between him who gives the notice and the defendant to whom it is given; and if the notice had been communicated through those intervening parties and each had taken the time the law allows, the defendant would not have had the notice the sooner."

The same principle is also decided in the case of *Turner vs. Leech*, 4 Barnwall and Alderson, 454. 45/

We have been referred by the plaintiff, to what has been said by this court in the case of *McNeil vs. Wyatt*, 3 Humphreys, 128. The Bank at Lagrange in that case gave notice to one Glover on the 14th to be served on Wyatt & McNeil. Wyatt was served on the 14th, and McNeil on the 15th. But Glover proved in the Circuit Court, that he was the general agent of Wyatt, to serve notices for him when his name was on paper. And the Circuit Court left it to the jury to say, whether Glover, who served the notice, was not Wyatt's agent as well as the agent of the Bank; and if he was, then the notice to McNeil on the 15th, one day after Wyatt received notice, was sufficient.

This court held, that there was not any error in this part of the charge; and placing the validity of the notice, as this court did, upon that special ground, is a distinct recognition of the general principle maintained by us in this case.

Upon the whole, we affirm the judgment.

WHITE vs. HARRIS.

The writ of *supersedeas* is the proper remedy where an attempt is made to enforce a judgment which has been discharged. This process, however, cannot be used to vacate and correct a judgment for usury.

This case was tried in the Circuit Court of Giles county, and a verdict and judgment (Judge Dillahuntty presiding) were rendered in favor of the plaintiff. The plaintiff appealed.

N. S. Brown and *H. Thomas*, for White.

Wright, for Harris.

TURLEY, J. delivered the opinion of the court.

Archibald C. White recovered several judgments before a Justice of the Peace for Giles county, on the 7th day of February, 1842, against William Brown and Ira E. Brown, upon notes in which Ira E. Brown was surety for William Brown: these judgments were stayed by Robert S. Harris, without having been requested so to do by Ira E. Brown the surety. After the expiration of the time for which the judgments were thus stayed, executions were issued thereon, and levied on the property of the defendant Robert S. Harris, William Brown being insolvent, and Ira E. Brown claiming protection as surety, upon the ground that the judgments were stayed by the defendant at the sole request of William Brown. Defendant filed his petition for a writ of *supersedeas*, alledging that he had stayed the executions at the request of Ira E. Brown: he afterwards amended his petition, and charged that the contracts upon which the judgments were rendered were usurious. A jury was impaneled in the Circuit Court to try the matter in dispute between the parties to the petition, viz, the present plaintiff and defendant; and the defendant, as we suppose, having failed to prove that he stayed the judgments at the request of Ira E. Brown, as well as of William Brown, the only matter submitted to the jury, was upon the question of usury. Under the charge of the Judge, a verdict was found in favor of the

[White vs. Harris.]

plaintiff, for the amount of \$588 debt, and \$100 44 damages for the detention; being less by twenty per cent. than the amount called for in the notes, that being the amount of discount at which plaintiff purchased them. The usury is controverted in the proof; but we do not deem it necessary to enter into an investigation of the question, nor into the accuracy of the opinion and charge of the Judge, as we are well satisfied that the defendant Harris could not legally make this defence in this mode of proceeding.

We are referred to an authority from Comyn's Digest, title *Audita Querela*, which asserts, that the remedy by *audita querela* is proper where a judgment has been confessed upon a usurious contract; and it is urged that the remedy by *supersedeas* has been adopted in this State in the place of the *audita querela*.

We are aware, that in case of payment after judgment, it has been held that the remedy by *supersedeas* is proper, and that it is said to have been substituted for the *audita querela* in such cases. But we apprehend, that it never has, and never can be determined to be identical with that remedy in all cases.

The remedy by *supersedeas* is unfit for many cases in which the *audita querela* is used in England, and in none more so, perhaps, than the very class of cases under consideration, viz, an attempt to vacate and correct a judgment for usury. To give a writ of *supersedeas* this power, is to make it more effectual than the ordinary mode of obtaining a new trial of cases originating before Justices of the Peace by *certiorari* and *supersedeas*, which it is obvious could not have been used in this case. The only remedy for a stayor in such cases, if he has one, is by bill in chancery.

We, therefore, reverse the judgment of the Circuit Court, and discharge the *supersedeas*, and give judgment accordingly.

ORR vs. WILLIAMS.

Where a note is made payable in property at a given day, the tender must be made in *good faith* and in pursuance of the terms of the contract. Any substantial variation from terms of the contract, will subject the payor to the payment of the money.

This case was tried before Judge Dillahunt and a jury of Marshall county, and a judgment rendered for plaintiff; from which the defendant appealed.

Nicholson, for plaintiff in error.

No person appeared for the defendant.

TURLEY, J. delivered the opinion of the court.

On the 1st day of October, 1842, Samuel Orr, the plaintiff in error, entered into a written contract, by which he agreed with Benjamin Williams, the defendant in error, to pay him, on the 25th day of December, 1843, thirty dollars, which might be discharged in a mule, horse, or colt, at valuation.

Upon the trial, (as appears from the bill of exceptions,) it was proved that Orr, on the 15th day of December, 1843, tendered to Williams a horse, which he refused to receive; but said, that if he could put him on him he would credit the note for what he was valued at, and each chose a man to value the horse, and he was valued at fifteen dollars. Williams did not accept the horse and did not credit the note with the fifteen dollars. It also appears, that on the day the note fell due, Orr tendered another horse, which Wilson also refused to receive; he was valued at twelve dollars and a half: he was again tendered, together with two dollars and a half, making the fifteen dollars, which Orr claimed to be the amount due on the note, after deducting the fifteen dollars for the first horse tendered. Williams received the two dollars and a half, credited the note with it, and sued the payor for the balance.

Upon the trial in the Circuit Court, the Judge charged the jury, "that the payor of the note could not make a tender of the property specified in the note, before it was due, so as to force

[ORT vs. Williams.]

the payee to receive it; and although he could on the day the note fell due discharge himself by tendering or delivering a horse of less value than \$30 and the balance in money, yet he could not deliver a horse at one time before the note was due, and a horse and money when the money became due, and discharge himself, unless the plaintiff agreed that he might do so." This charge, it is contended, is erroneous. We think it is substantially correct; and that the tender, as proved, was illegal.

The contract was, that the debt might be discharged in a horse, mule, or colt; not in horses, mules, or colts. It is obvious, that the payee might find it to his interest to have a horse, mule, or colt, worth thirty dollars, and very much to his injury to have two or three of either, worth ten or fifteen dollars each. Moreover, it is obvious from the proof, that the tender was not made in good faith, but was an attempt to palter with the contract. The horse first tendered was a stallion, valued at fifteen dollars; the second, as one of the witnesses said, was a stump sucker, and valued at twelve dollars and a half. Surely no fair man would tender two such horses in payment of a thirty dollar debt; and surely no rational man could be expected to receive them.

Let the judgment be affirmed.

BURT vs. DAVIDSON.

1. In a case of motion against a constable before a justice of the peace for the non-return of an execution, it must appear that the notice was served five days before trial, or that the defendant waived his right to notice by appearance and defence.
2. The judgment against a constable by motion before a justice of the peace, for non-return of an execution, must recite the judgment on which the execution issued.
3. A judgment by motion against a constable before a justice of the peace, was as follows: "It is considered by the court, that Willis Burt recover a judgment against James Davidson and John Adkins and S. H. Lokey his sureties, the said sum," &c. Held, that this did not sufficiently aver the suretyship of the defendants Adkins and Lokey.
4. A writ of *certiorari* is a substitute for an appeal. See *Rogers vs. Jewell*, 10 Yerger, 254.

This case was tried by Judge Marchbanks and a jury of Franklin county, and a verdict and judgment rendered in favor of the defendant; from which the plaintiff appealed.

Taul, for plaintiff.

H. L. Turney, for defendant.

GREEN, J. delivered the opinion of the court.

This is a motion against a constable for failing to return an execution.

The cause was commenced before a Justice of the Peace, who gave judgment against Davidson, the constable, who obtained a *certiorari* to remove the cause to the Circuit Court. The Circuit Court submitted the questions in controversy to a jury, who found for the defendant; and the court gave judgment, that he go hence; from which judgment the plaintiff appealed to this court. Although we concur with the Circuit Court as to the result of the cause, yet we think the intervention of a jury unnecessary, and calculated to embarrass the questions to be decided. These questions were, first, whether the defendant had notice of the motion before the Justice as the law directs; and if not, did he defend the motion on the merits? second, was the defendant excused for the non-return of the execution by any thing the plaintiff did? and third, is the judg-

[Burt vs. Davidson.]

ment of the justice valid, containing a statement of facts which must appear to the court in order to authorize it to pronounce judgment?

First, as to notice. The notice is dated 6th April, 1843, and the constable who served it, endorsed it, "Executed on James Davidson, by leaving a true copy with him, and set for trial April 29th, 1843, before John Byrum, J. P. at his house." This endorsement does not state when the copy of the notice was delivered, so that we can see that it was served five days before the time set for the trial; and as there is no other proof of notice, it results that the five days' notice of the motion, which the law requires, does not appear to have been given. But it is supposed by the plaintiff in error, that the petition for a *certiorari* filed by the defendant, shows that he was present before the Justice and made defence. We do not think this fact appears by any thing stated in the petition. It is true, the petitioner does not complain that he had no sufficient notice of the time the cause was set for trial; but he says the cause was continued until another day, when judgment was rendered against him; of which time he had no notice. According to this statement he did not appear to defend the motion on the merits.

2. But in the second place, we think the judgment of the Justice altogether defective. It does not state the judgment upon which the execution issued; nor does it state that it appeared to the Justice, that John Adkins and J. H. Lokey were the sureties of Davidson the constable. The conclusion of the judgment, "That it is considered by the court that Willis Burt recover of the said James Davidson, and John Adkins and S. H. Lokey his sureties, the said sum," &c. is not such a statement of the fact of their suretyship as this court has uniformly held to be necessary.

In these summary proceedings, as well before Justices as before courts of record, every fact which is necessary to give the court jurisdiction and to authorize the judgment, must be set out in the judgment as having been made to appear. It is not necessary to state the evidence by which any of the facts were proved; for if the facts be stated, it will be presumed there

[Burt vs. Davidson.]

was sufficient testimony to authorize the court to assume their existence.

The counsel for the plaintiff in error contends, that the petition for *certiorari* ought to have been dismissed, because the case was brought into the Circuit Court to correct the errors in the judgment and proceedings of the Justice, and not for a trial on the merits, and he cites the case of *Rogers vs. Ferrell*, (10 Yerg. Rep. 254,) in support of this position. In that case, Rogers had obtained a judgment before a Justice of the Peace against Ferrell, upon which an execution issued. Ferrell applied to two Justices of the Peace for writs of *certiorari* and *supersedeas*, alledging therein that the judgment had been paid, and praying the execution to be quashed. This, the court say, the acts of 1801, ch. 7, s. 4, and 1833, ch. 65, s. 2, did not contemplate as the office of *certiorari*. These acts only contemplate cases where the writs of *certiorari* and *supersedeas* are substituted in place of an appeal; not a case where the judgment is not complained of, but where relief is sought from an unjust and illegal execution of it. These writs cannot be used in place of the *audita querela*.

This statement of the case of *Rogers vs. Ferrell*, shows that it has no application to such a case as the one before the court. Here the judgment is complained of, and the writs of *certiorari* and *supersedeas* are substituted for an appeal. Upon an appeal the cause would have been before the court to be determined upon the very questions now presented.

We think the defendant's motion to quash the proceedings before the Justice of the Peace should have been sustained.

Let the judgment be affirmed, and the proceedings before the Justice be quashed.

JOHN E. and DRURY DANCE *vs.* MCGREGOR *et als.*

1. Leave to file a bill of review should be obtained by motion in open court. But where the bill was filed by order made at chambers and a general demurrer filed thereto, this objection is waived, and the court will proceed to determine on the validity of the decree sought to be reversed.
2. No decree can be regularly rendered against an administrator *de bonis propriis* on a bill filed against him in his representative character not suggesting a *devastavit*.
3. A decree rendered against an administrator *de bonis propriis* after the administrator has filed his bill under the act of 1837, suggesting the insolvency of the estate, is erroneous, and will be reversed on bill of review.

This bill of review was filed by John E. and Drury Dance, in the Chancery Court at Murfreesborough against Martha McGregor and her guardian R. M. Burton and Andrew J. McGregor and his guardian Andrew J. Donelson and others.

The allegations of this bill are as follows:

Complainants, your orators John E. and Drury Dance, would represent unto your honor, that on the 7th day of August, in the year 1839, the said minors above-mentioned, by their said respective guardians, and the said Mary and Thomas, by the said Robert M. Burton as their next friend, filed in the Chancery Court of Rutherford, at Murfreesborough, their original bill against the said Ransford McGregor, as the executor of one John McGregor, deceased, and against the said Levi Wade, John C. Wade, Jacob D. Donelson, as sureties of said Ransford in his executorship, and also against your orators John E. and Drury, as the administrators of Russell Dance, deceased, also a surety for the said Ransford in his said executorship.

In the said bill it was alledged, that said minors, the complainants therein, were the children of John McGregor, deceased; that the said John McGregor departed this life in the summer of 1835, having first made his last will and testament, in which he appointed his wife Milberry McGregor and the said Ransford McGregor his executor and executrix; that the said will was duly proved at the August term, 1835, of the county court for said county, and the said Milberry and Ransford qualified as executor and executrix of the same; that the said Levi Wade, Russell Dance, Jacob D. Donelson, and one

[J. E. & D. Dance vs. McGregor et al.]

John Wilson, became the sureties of the said Milberry and Ransford, for the faithful execution of their trust; that subsequently, John Wilson, on his application, was released as one of said sureties, and one John C. Ridley was substituted in his stead, and that afterwards one John C. Wade was substituted in the stead of the said John Ridley by the County Court of Rutherford, so that the sureties, at the time of filing said bill, were the said Levi, John C., Russell, and Jacob D. Donelson, as would appear from certified copies of the bonds filed as exhibits with the bill; that the said Milberry McGregor departed this life about the 1st January, 1836, intestate—no division of the estate of the said John McGregor having taken place anterior to her death, and the said Milberry having no specific estate on which administration could be taken out; that the business of the estate of the said John McGregor, as well prior as subsequent to the death of the said Milberry, had been conducted by the said Ransford exclusively, no part of it ever having come to her hands; that the said John McGregor died seized and possessed of considerable real and personal property, of the value of twenty-four thousand six hundred and nineteen dollars, as appeared from the original inventory and account of sales filed by the said Ransford in the clerk's office of said county of Rutherford, which said inventory, as alleged, was unskilfully made out and impossible to be understood; that at the January term, 1838, of the County Court of Rutherford county commissioners were appointed to settle with said Ransford, as executor of said estate; that from said settlement it appeared that the said Ransford had left in his hands of the assets of said estate a balance of six or seven thousand dollars or more; that said settlement was as confused and unintelligible as the inventory, that vouchers were not filed, &c.; that justice could not be done to the complainants in said bill without having said inventory, returns, settlement, &c. overhauled in a court of chancery, a reference to a clerk and master, an account taken, &c.

Said bill prayed also an account of a certain partnership adventure between the said John McGregor, Ransford, and Jacob D. Donelson, with which your present complainants have

[J. E. & D. Dance vs. McGregor et als.]

no concern. Said bill then concluded with particular interrogatories to the said Ransford relative to the matters aforesaid and with a prayer for an account thereof to be taken and for a decree against the said Ransford and his said sureties for whatever balance might be found remaining in his hands. At the March rules, 1840, of said court, said bill was taken *pro confesso* as to your complainants John E. & Drury, who had failed to employ counsel to attend to it, upon the representation of said Ransford to complainant Drury that it was wholly unnecessary for them to incur the expense, as the matter would be settled and would be all right; and the complainants being ignorant of law, were the more easily induced to believe that they were in no danger of incurring responsibility, from the fact that before the filing of said bill they had suggested the insolvency of their intestate, Russell Dance, deceased, in the Chancery Court of the county where he was resident at the time of his death, in accordance with the act of the General Assembly of 1837-38, entitled An act to amend an act to regulate the distribution and division of the estates of persons dying insolvent, passed 18th October, 1835, of which fact, R. M. Burton, Esq. complainant and solicitor in the bill sought to be reviewed, was apprised about the time said bill was filed. At the March rules, 1840, of said court, said bill was also taken *pro confesso* as to co-defendants Levi Wade and John C. Wade. At the February Rules, 1840, the answer of Ransford McGregor was filed; and at the March rules succeeding, the answer of Jacob D. Donelson; to neither of which, replications were filed, as appears from the rule docket. At the July rules, 1841, said cause was set for hearing by complainants, and such steps thereupon taken and such proceedings had, that at the said July term an account was ordered to be taken by the Clerk and Master, of the executorship of the said Ransford, together with the other matters before mentioned, with which your orators have no concern.

To the succeeding term of said court, (the January term, 1842,) the Clerk and Master reported a balance of four thousand one hundred and eighteen dollars 85 cents as the balance of the assets of said estate remaining in the hands of said

[J. E. & D. Dance vs. McGregor et als.]

Ransford. Whereupon a decree was entered up by the court against the said Ransford for that sum, together with his said co-defendants his sureties, and execution awarded against complainants as administrators of the said Russell Dance, to be satisfied out of the goods and chattels of the said intestate in their hands *et si non de bonis propriis*. Complainants are advised that execution *de bonis propriis* was improperly awarded against them, and could only have been properly awarded after they had had an opportunity of defending themselves upon a *scire facias*. Complainants knew nothing of the proceedings against them (after the service of the subpœna) until execution was issued against them. Complainant would further represent, that the said final decree does not recite the fact that the said complainants were the children and legatees of the said John McGregor, deceased, in which character only they could claim. Complainants would further represent, that it appears from two bonds of the said Ransford, filed as exhibits to said bill, that their intestate, the said Russell Dance, entered into one only, (the bond first given, when the said Ransford qualified as executor,) and that afterwards, when one of the sureties, the said John Nelson, was released, and the said John C. Wade substituted in his place, he (the said Wade) gave a separate bond. Complainants would submit, therefore, whether the release of the said John Nelson by order of the County Court, would not be a release to all his co-sureties, unless they entered into a new bond together with the person substituted in his stead.

Complainants would further represent, that an execution *de bonis propriis* as aforesaid has issued against them upon said decree; and without the interposition of your honorable court, they are likely to sustain great injury. They charge, that it is inequitable and unconscientious for complainant to seek to satisfy said execution, or any part of it, out of their proper goods, when the estate of their intestate was insolvent, which insolvency had been properly suggested before complainants obtained their decree or had even filed their bill as aforesaid; and they insist that complainants should be placed on a footing

[J. E. & D. Dance. vs. McGregor et als.]

with other creditors, either to make their money out of the other sureties, or file their claim for *pro rata* satisfaction.

Your orators alledge, that said decree is erroneous, as they believe, and is likely to operate very oppressively upon them; and they pray, therefore, that the same may be reviewed, the errors in law corrected, and your orators permitted to avail themselves of the defence of the suggestion of the insolvency of the estate of their said intestate.

To this bill there was a demurrer, and joinder in demurrer.

It was argued before Chancellor Bramlitt, at the July term, 1843. He was of the opinion, that there was no equity in the bill of the complainants, and dismissed it.

The complainants appealed.

D. M. Currin, for complainants.

1st. The suggestion of the insolvency of the estate of their intestate by the complainants, in the Chancery Court of Davidson county, in accordance with the act of 1837-38, was a proceeding of which all of the creditors of Russell Dance were bound to take notice. Besides, in this case, Robert M. Burton, the solicitor of all the complainants, and the guardian *ad litem* and the guardian proper of some of them, had special and personal notice of that fact communicated to him by one of the complainants. It was, therefore, inequitable, and a fraud upon their rights, to take a decree against them *de bonis propriis*. Moreover, laches is not to be attributed to the complainant in the case, on the ground that they suffered the original bill to be taken *pro confesso* as to them; nor failure to plead to be construed into an admission of assets, as in ordinary cases. For no plea which they could have pleaded, with truth, would have effected, in any degree, their rights or their liability. They could not have pleaded no assets, or *plene administravit*; for they had assets; though they were insufficient and beyond their control, being under the exclusive direction of the Chancery Court, which, by virtue of the suggestion of insolvency, had obtained jurisdiction of the matters connected with the estate, and suc-

[J. E. & D. Dance vs. McGregor et als.]

ceeded to the appropriate rights and duties of an administrator. They could not have pleaded *plene administravit prater*; for, until the termination of the chancery proceeding, it could not be ascertained what residue there would be, or what dividend appropriated to each particular debt due from said estate. To have pleaded, formally, that they had suggested the insolvency of the estate, would not have availed them, more than their silence; such a plea being unknown to the common law; the administration of insolvent estates by the chancery and county courts being a matter entirely of statutory regulation, and no provision having been made by the statutes for such a plea. Inasmuch, therefore, as it could not have been the object of the statute regulating the administration of insolvent estates, to deprive the administrator or executor of any plea which he had at common law, without affording him adequate protection; and inasmuch as that result would necessarily follow, if it should be established that the suggestion of the insolvency of an estate must be formally pleaded by an executor or an administrator when sued, it would seem that the filing of a bill suggesting insolvency by an administrator or executor should be regarded as a proceeding in the nature of a proceeding *in rem*, of which all creditors were bound to take notice; and consequently that the usual injunction granted in such case would operate to prevent any creditor from proceeding against such an estate, otherwise than by filing his claim for a *pro rata* distribution, and thus having himself made a party to the bill.

2nd. The *pro confesso* judgment against the complainants did not imply such an admission of assets as to authorize a decree against them *de bonis propriis*; for though when an executor or administrator is sued in a court of law, assets are presumed, unless, as a fact, it be put in issue by the pleadings; yet, in a court of equity, assets in his hands must be alledged, and, if denied, or not admitted, must be proved. *Evans vs. Inglehart et als.* 6 Gill & John. 171; *Corneal's heirs vs. Dey*, 3 Litt. 397; *Mitchell vs. Roberts*, 2 Dev. Equity, 578; Story's Equity Pleading, 219; *Dawson vs. Clay's heirs*, 1 J. J. Marsh. 167.

3rd. The decree in the case sought to be reversed was *de bonis testatoris, et si non*, whereas it should have been *de bonis*

[J. E. & D. Dance vs. McGregor et als.]

testatoris only in the first place, and could only have been *de bonis propriis* after a *scire facias* had issued to charge the complainants personally, to which they might have had an opportunity of pleading the want of assets, or making other appropriate defence. *Wray vs. Williams*, 2 Yerger, 302; *Reed Cox vs. William Cox's adm'r.* 305; *Parker vs. Stevens*, 1 Haywood, 250.

4th. Said decree does not fully and sufficiently recite the facts upon which it was founded; and for that cause, should be reversed. See *Burdine vs. Shelton*, 10 Yerger, 41.

H. M. Burton, for the defendants.

Ed. A. Keeble, for complainants.

REESE, J. delivered the opinion of the court.

This is a bill of review by the complainants, the administrators of Russell Dance, deceased, to reverse a decree obtained against them in the Chancery Court, by the guardian of the minor heirs of McGregor and others, for error, patent upon the said decree. The error set forth in this bill is, that the complainants were made defendants in their representative character only, as the administrators of Russell Dance, deceased, and not in their individual character; that said bill was taken for confessed against them, and heard *ex parte*; that in said bill there was no allegation whatever that they had wasted or committed a *devastavit* of the assets in their hands; that there was no enquiry or report as to the amount of those assets; and yet, that in the final decree it was adjudged that they should pay the amount decreed against them out of the goods and chattels in their hands as administrators, if sufficient, and if not, out of their own proper goods and chattels. And further, that prior to this decree the said complainants, the administrators of Dance, had filed in the Chancery Court their bill suggesting and alledging the insolvency of their said intestate's estate, pursuant to the act of 1837, of which the complainants in the said original bill had notice. Upon general grounds, there-

[J. E. & D. Dance vs. McGregor et als.]

fore, and upon this latter ground, they alledge that the decree against them individually, *de bonis propriis*, was erroneous. Of this opinion, and upon both grounds, is this court. Even at law, it has been held for more than twenty years, since the case of *Massingill vs. McCorkle*, in Haywood's Reports, that such a judgment is erroneous, and, *a fortiori*, it will be so held, in equity, where the object of the bill is to obtain a decree against the personal representative in that character, and where there is no issue, or contest, as to whether said representative has wasted the assets and subjected himself individually, and where there has been no enquiry, report or decree on the amount of assets that came to the hands of the representative, and their proper or improper application. If the effect of the act of 1837, upon the filing of a bill suggesting insolvency be not to suspend *eo instanti*, and by mere operation of the law and of the act of filing the bill, all further progress in suits pending against the personal representative, it at least makes any future decree or judgment against him individually, and *de bonis propriis*, erroneous. Not to hold so, would be to contravene the very object of the act and the protection intended to be furnished by filing the bill, and the equitable *pro rata* distribution, which forms its leading policy. That a decree in chancery does not, and in general should not conclude a personal representative as to assets, see the case of *Read Cox vs. Wm. Cox's executor*, 2 Yerger.

Leave to file this bill of review, and an injunction were obtained from the Chancellor at chambers; and it is said, that according to the course of a court of equity, leave to file the same should have been obtained in open court; and we think there should have been an order to that effect made upon the minutes of the court. But this question does not arise, and cannot be looked into, upon the demurrer. The formal demurrer to a bill of review is like the plea of *in nullo est erratum* in a writ of error at law. It affirms the correctness and validity of the original decree; it places the matter upon that; it raises no such question as the one relating to the leave of the court. If the parties defendant to this bill proposed to place themselves upon that ground, they should not have demurred, but should

[Peter vs. The State.]

have moved to take the paper from the files; in which case, no doubt, the court would thereupon have granted the leave to file the bill. In pursuing the course they did, the necessary leave was taken for granted, by both parties and by the court, and these complainants should not now be turned round here upon such an objection.

Upon the whole, then, we are of opinion, that the decree of the Chancellor on this bill of review should be reversed, and also so much of his decree in the original suit, as proceeds against these complainants individually *de bonis propriis*: and we order, that the complainants recover their costs in the bill of review from the representatives and heirs of McGregor.

PETER vs. THE STATE.

An indictment against a slave for a rape on a free white woman need not alledge the ownership of such slave, and if alledged and disproved, the variance is not fatal.

Peter was indicted on the 19th day of November, 1844, in the Circuit Court of Williamson, for an attempt to commit an assault on Minerva Shelby, a free white woman, on the 29th day of May preceding.

• The indictment charges, that the offence was committed by "Peter, a negro slave, the property of John Blackman, late of Williamson county."

The case was submitted to a jury, on the plea of not guilty, Judge Maney presiding, during the November term, 1844.

The State proved, that the prosecutor, who was the father of Minerva Shelby, hired the slave Peter of John Blackman, who, as witness believed, was the owner of the slave.

The defendant introduced Hays Blackman, who was the son of John Blackman. He stated, that his father, about seven years previously, had conveyed the slave Peter to him in trust for his children; that his father had a lifetime estate in said Peter; that John Blackman died on 3rd day of November, 1844, and that

[*Peter vs. The State.*]

he made a will directing his estate to be sold and divided amongst his children.

The defendant was convicted. A motion for a new trial having been made and overruled, he was sentenced to be executed. He appealed.

A. Ewing, for plaintiff in error.

Attorney General, for the State.

It is urged that there is a variance between the allegation and the proof.

It is to be observed, that this offence is created by statute, and that nothing in the statutes creating the offence is seen to create the necessity of an allegation of ownership. The increased punishment inflicted by statute does not find its justification in the fact that the defendant is owned by any one, or is a slave; but on the fact that he is a "negro or mulatto." The increased punishment is based by the statute on caste, or race, or color. The punishment would be the same if the offence was committed by a free negro. There is no necessity for inserting in the indictment allegations which do not constitute any part of the offence. This allegation is surplusage, and may be rejected. It would have been sufficient to have charged the offence against "Peter, a negro."

Upon what grounds of reason or convenience in the administration of the law can it be insisted, that an allegation which constitutes no part of the offence shall be inserted in the indictment? All that would seem necessary to be added, either on allegation or proof to the case of a white man, would be that pointed out in the statute, to wit, that defendant was a negro. The requiring an allegation of ownership and proof in accordance therewith, would only throw obstacles in the way of a successful administration of criminal law, without furnishing the defendant with additional means of manifesting his innocence, or security against punishment again for the same offence.

The fact that A owns the slave, or B owns him, does not alter the character of the crime, or affect the nature or extent

[Peter vs. The State.]

of the punishment. It is the same in either event. Russell, page 658, note 2, declares, that all that is necessary to be averred in the indictment are the material facts which constitute the crime, and which are necessary to enable the defendant to avail himself of the verdict and judgment in case he should be again charged with the same offence.

The facts which make up the offence are three. 1st. The assault. 2nd. The intent. 3rd. The caste of defendant. And these are all that are necessary to be averred or proved.

The defendant, on a second indictment for the same offence, would only find it necessary to aver and prove that he was Peter, the negro tried and convicted on the indictment for the same offence.

If in all cases of rape by slaves the ownership be necessary to be alledged and proved, a new element of difficulty is thrown in, to wit, questions of title, which are calculated to defeat the administration of justice, without answering any useful purpose.

No case can be found where allegations not constituting a part of the offence are required to be made, solely to protect the defendant; for the law has only required that the crime should be stated, and that the defendant should make out his identity by additional averments and proof.

In reference, then, to allegations not necessary for defence, or to make out the crime, which are inserted in the indictment, they are to be considered surplusage, and may be rejected. 2 Leach, 678; 2 Russell, 568.

In the case of *Rex vs. Hunt*, Ellenborough says the distinction runs through the whole of criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed the substantive crime therein specified."

There are a numerous class of cases connected with this subject which do not apply to this case. In these cases it has been regarded as proper to state, and state correctly, the person upon whom the wrong has been inflicted, as who is murdered, robbed, or whose property has been stolen. In cases of robbery, however strong cases of variance in fact, in allega-

[Peter vs. The State.]

tions and proof, are presented, in which the variance was not regarded as fatal in law. The defendant Sumner was found guilty of robbery in a field near the highway. The jury found the defendant guilty of robbery, but not near the highway. The conviction was sustained. 2 Russell, 695. So Pye was charged with robbing Robert in the dwellinghouse of Wil-day. It was committed in a house, but it did not appear who was the owner. The conviction was affirmed. Russell, 695. See also *Healy's* case, 11 Moody, 1. So of breaking a house in the night. It was proved to have been broken in the day. It was held no variance, there being no difference in the punishment by English statute. So for having a die unlawfully in possession made of steel. It was made of iron. Held, no variance.

In all these cases the averments were in some degree descriptive of the offence; yet they were rejected as immaterial, and not necessary to be inserted in the indictment, or if inserted and disproved, yet ruled no variance.

In the case now on hand, the averment of the ownership of the defendant does not touch the nature of the offence. The indictment states the whole name of a slave, Peter. It states him to be a negro—then a slave—then there is superadded the averment that he is the property of John Blackman. This is a detailed personal description of the defendant; more remote and more immaterial than misnomer. This is wholly a different case from one where the defendant is charged with larceny of a black horse and it turned out that the horse taken was white; or where he is charged with having ravished A B and he is proved to have ravished C D, or where it is charged that he stole the property of E when it was the property of H. The general doctrine is based on the idea of deluding the defendant with one case charged and another proved. This does not have any force in this case, for the defendant is arrested and charged with committing a specific offence on the body of a specific person; and he cannot complain that he is deluded by a misdescription of himself. This detailed description of himself cannot affect his personal identity, nor his crime.

If this objection was available at all, it would only be regarded as matter in abatement.

[Peter vs. The State.]

In civil and criminal cases misnomer must be pleaded in abatement. 11 Mass. 76, 397; 10 do. 205; 4 Cowen, 148; 10 Serg. & R. 257, 2 Leach, 538; Bacon, title *Abatement*.

If a party fails to plead in abatement to misnomer, and is sued or indicted again for the same offence by right name, he can plead former conviction and aver that he is *una et eadem persona*. Bacon, vol. 1. b. 7; 2 Strange, 1218. Appearance and plea admits that he is the person intended. Haw. 265, sec. 125.

"In case of felony at common law, if a person were indicted by a wrong name he could not plead misnomer, but was obliged to plead to the felony; for the fact being sworn against the party present, it was thought there could be no misnomer; as where the party appeared by attorney: and felons generally go by no certain name nor have they any fixed habitation." Bacon, vol. 1, page 8.

Foster, for plaintiff in error. .

Per Curiam. There is no validity in the legal objections raised by the counsel for plaintiff in error.

The verdict and judgment must, however, be set aside, as the record does not satisfy our minds as to the character of the acts committed or intended by the prisoner. .

Judgment reversed.

PLANTERS' BANK vs. WHITE.

Where an endorsed note put into circulation comes to the hands of the maker for value, it is a discharge of the endorsers; not so, where it was endorsed and returned to the maker for his accommodation and by him put into circulation with his endorsement.

Assumpsit in the Circuit Court of Montgomery county, by the Planters' Bank against White, an endorser. Plea, non-assumpsit.

It was tried by Judge Martin and a jury of Montgomery county, at a special term held in December, 1844, at Clarksville, and a verdict and judgment were rendered in favor of the defendant. The plaintiff appealed.

Kimble and Fogg, for the Bank.

Garland, for White.

TURLEY, J. delivered the opinion of the court.

William White was sued by the Planters' Bank of Tennessee, as the endorser of a promissory note drawn by C. M. Barker & Co. on the 9th day of August, 1843, for the sum of one thousand dollars, payable at four months, at the Planters' Bank at Clarksville. At maturity the note was duly presented for payment, and dishonored, of which facts the defendant White was duly and legally notified.

But it appeared upon the trial, that the endorsement of White was for the accommodation of the makers, the design of drawing the note being to renew another falling due in Bank, executed by the same makers; that Charles M. Barker, one of the partners of the firm of Charles M. Barker & Co. also endorsed the note as last endorser, for the purpose of enabling him to check for the amount, so as to appropriate it to the previous note, which he did. Whereupon it was contended, that the endorsement of Barker, subsequent to that of White, was considered as evidence that the note had come into his possession in due course of trade, and that being a member of the firm

[Planters' Bank vs. White.]

which drew it, it operated as a satisfaction of the debt, so far as previous endorsers were concerned, and that they were thereby discharged from any liability to the Bank, who received it by Barker's endorsement.

Upon this point, the court charged the jury, "that when negotiable paper came to the hands of the makers, or any one of them, for value, after the same had been endorsed, and was by him endorsed and put into circulation, such subsequent acquirement of the note operated as a discharge of the previous endorsers, if the maker to whose hands such negotiable note came gave value for it, and that the law presumes such valuable consideration was paid upon such endorsement; but such presumption might be rebutted by proof, showing that in point of fact, C. M. Barker, the last endorser, gave nothing for the note, or that the same was made for the accommodation of the makers, to raise money thereon; that if the jury believed said note was made for the accommodation of the makers, and endorsed with that view and for that purpose, the subsequent possession by C. M. Barker would not operate as a discharge of the previous endorsers." Upon this charge as applicable to the proof, the jury found a verdict for the defendant, and a motion for a new trial was overruled.

In this, we think there was error. The proof shows, most conclusively, that the note was made for the accommodation of the makers, and endorsed for that purpose; and there is no proof whatever to the contrary. The case, then, fell within the exception so clearly stated by the court to the jury, and the verdict should have been for the plaintiff. It not having been so, a new trial ought to have been granted.

Reverse the judgment, and remand the cause for a new trial.

HERRON vs. MARSHALL.

Distributees may recover slaves illegally sold by the administrator. But the administrator cannot avoid his own sale, and the distributees are, therefore, not affected by his failure to sue within the time prescribed by the statute of limitations.

D. Campbell, for complainants.

He cited 10 Yerg. 394, 400: 1 Story's Eq. sec. 422, 423, 424: 5 Yerg. 1.

Fogg, Marshall and Foster, for defendants.

They cited 2 Devereux, 360: 14 English C. C. 500: 9 Pick. 212: 5 Pickering, 348: 1 John. 159: 5 John. 489: 2 Williams on Ex. 1156-7: 1 Williams on Ex. 593: 4 Bac. 480.

TURLEY, J. delivered the opinion of the court.

This is a bill on the part of complainants, to recover from the defendants a negro man, named Michael. The following statement of facts shows the ground upon which the conflicting rights of the claimants rest.

On the 8th day of October, 1827, the will of Robert Parrish was duly proved in the County Court of Williamson county, State of Tennessee, and Matthew F. Parrish appointed the administrator, with the will annexed.

By the provisions of the will, all the property of the testator, after the payment of his just debts, was bequeathed to the complainants, the children of his brother Fountain Parrish. Matthew F. Parrish, the administrator, returned an inventory of the estate to the January term, 1828, of the Williamson County Court, in which, among other assets, is specified the negro man Michael the subject matter of this controversy. This negro the administrator, on the 28th day of April, 1828, sold and delivered to one Michael Doyle, for the sum of \$450. This sale was made by the administrator, without authority from either the Court of Chancery or the Circuit Court of the county. Doyle kept possession of the negro until his (Doyle's) death, which event happened in January, 1843, and the defendants are the executor and executrix of his last will and testament.

[Herron vs. Marshall.]

All the complainants were infants, under the age of 21 years on the 28th of April, 1828, and one of them, E. Parrish, was still so at the time of filing this bill.

Under this statement of facts, are the complainants entitled to recover?

By the act of 1827, ch. 61, sec. 1 and 2, it is provided, that no executor or administrator shall make sale of the slaves of his or their testator or intestate, without they be directed by the will of the testator so to do, unless upon petition or bill, filed for that purpose in the Circuit or Chancery Court of the county, such sale be ordered and directed, and all sales, made by executors or administrators, of slaves, contrary to the provisions of the act, are declared to be void. Consequently the sale of the negro in controversy from Matthew F. Parrish, administrator of Robert Parrish, made on the 28th day of April, 1828, conveyed no title to Michael Doyle, the testator of the defendants, and the complainants are entitled to the relief sought, unless their claim be barred by the statute of limitations. It is not argued that the devisees, under the will of Robert Parrish, are barred by reason of a neglect on their part to assert their rights within proper time, for some of them were under age at the time the bill was filed. But it is contended, that in as much as the sale is declared by the statute to be void, no right whatever passed thereby to the vendee, Doyle; and that the administrator of Robert Parrish might have commenced suit, notwithstanding the sale, against Doyle immediately to regain the possession of the negro; that, therefore, the statute of limitations commenced running in favor of Doyle the moment he took possession of the negro, and no suit having been brought within three years thereafter, he is protected by the statute of limitations.

To this reasoning, we cannot assent. The statute was passed for the protection of legatees and distributees, and to hold that an executor or administrator might, in violation of the provisions of the statute, sell the negroes of the estate, and make that sale good and valid, by a neglect to sue for their recovery within three years thereafter, would be utterly destructive of the statute, and render it inoperative and unavailable.

[Herron vs. Marshall.]

But, furthermore, we do not think, that the administrator or executor could, in such case, set aside his own sale, and sue to recover the possession of the negro; and this, upon the well settled principle, that a man shall not be permitted to set up his own illegal acts to vitiate his own contracts; in other words, we think that the executor or administrator would, in a suit against their vendee, be estopped from saying, that they had violated the statute in selling the negro. The consequence is, that the legatees or distributees may sue, and if they do so with-in time, will be permitted to recover.

We are, therefore, of opinion, that the complainants are entitled to the relief sought. But in as much as the money paid by the testator of the defendants, was in all probability expended in the payment of debts due from the estate of Robert Parrish, deceased, they are entitled to an account therefor, if it can be made to appear that it was so expended.

The case will, therefore, be referred to the Clerk and Master for a report upon this point, and also for the purpose of ascertaining what is the reasonable hire of said negro during the time he has been in the possession of the defendants and their testator; and if the amount of money paid as the price of the negro, with interest thereon, up to this time, shall exceed in amount the reasonable hire for the same time, the surplus shall be a charge upon the negro till the same is paid.

DAVIS & RICHARDSON vs. CLAYTON, WILLS *et als.*

1. An allegation in an answer, which is not responsive to the bill, is not evidence for defendant, and the *onus probandi* is on the defendant to establish it.
2. An attachment bill charged, that defendant held a note given by Black & Morton to Wills, the judgment debtor. Defendant answered, that he had the note, but that the title to the note was in him by prior assignment. Held, that this allegation of ownership was not responsive to the bill, and not evidence for the defendant.
3. Where an attachment bill charged one of the defendants with being the depository of a promissory note, the allegations in the answer of such defendant, as to the title to said note, would not be evidence for a co-defendant.

This is an attachment bill, which was filed in the Chancery Court at Murfreesborough, and having been heard on bill, the answer of a portion of the defendants and replications thereto, and *pro confesso* judgments against the others, a final decree was rendered in favor of the complainants at the January term, 1843, by Cancellor Ridley. The defendants appealed.

H. M. Burton, for complainants.

E. A. Keeble, for the defendant, Clayton.

GREEN, J. delivered the opinion of the court.

This is an attachment bill, and alleges that the complainants, have recovered judgment against the defendant, William Wills, for \$658; that execution has been issued thereon, and returned no property found; that said Wills has absconded from this State, and resides in Missouri; that before he left this country, he held a note on Thomas Black and James W. Morton for \$450, payable the 23d of December, 1843; that said note is in the hands of Mary Wills and Benjamin Clayton, and is changed from one to the other, to prevent creditors of William Wills from reaching it, and that they have no interest in the note. All the above named persons are made parties, and process of attachment is prayed for, and a decree for said note in part satisfaction of his debt.

The bill is taken for confessed against Black, Morton and William Wills, all of whom are non-residents of this State.

[Davis & Richardson vs. Clayton, Wills et als.]

The defendant, Clayton, admits the note in question exists, and is in his hands; but he insists that the legal title thereto is in him. He states that he was bound as surety to a large amount for William Wills; that Wills had conveyed to him certain property for this indemnity, which has been sold, and proves insufficient by about \$300; that when Wills was about leaving this country, he wrote an assignment on the said note to the defendant, Clayton, and delivered it to his co-defendant, Mary Wills, with directions, to hand the same to him for his further indemnity; but that she supposing he had property enough to secure him, washed off the said written assignment, intending to appropriate said note to her own use; but since finding that defendant, Clayton, had not enough in his hands to save him harmless, she delivered said note to him.

He insists he has a legal right to said note, for the payment of said \$300, and is willing the balance due on it shall go to the complainants.

Mary Wills' answer states, that the note was assigned to Clayton by William Wills, and placed in her hands to be delivered, but she washed off the assignment, and retained the note about two months, when understanding that he would not be indemnified by the property he had received, she informed him of these facts, and gave him the note.

The only question in the case is, as to Clayton's ownership of the note on Black & Morton.

1st. It is contended by the defendants counsel, that the answer of Clayton is made evidence for him, by the reason of the discovery sought in the bill, to which the answer is responsive. The interrogatories in the bill are, that the defendants, Clayton and Mary Wills, answer, whether they or one of them have the said note; that they state what other notes or choses in action, they or either of them have, belonging to William Wills. It is at once perceived, that these interrogatories do not touch the question of the title to the note in controversy.

If the complainant had asked, if they had the note in possession, and by what title or authority they held it, the answer would have been evidence; for such interrogatory would have made the defendants witnesses as to the assignment. But no

[*Davis & Richardson vs. Clayton, Wills et als.*]

such interrogatory is in the bill; and hence the statement in the answer is matter of defence, which must be proved.

2d. It is next insisted, that Mary Wills' answer is evidence for her co-defendant, as she was a mere depositary of the note. If the bill had sought a discovery, as to the manner the note came to her hands, and the object for which it was placed there, her answer would have been evidence, and might have been used for her co-defendant. But no such discovery is sought.

The question then results in the simple enquiry, whether Clayton, because of the indebtedness of Wills to him, can resist this bill. And we think he cannot. The complainants, by their superior vigilance, have acquired a lien upon this note and the fund it secures to be paid, that cannot be resisted by a mere depositary of the note, although he too, may be a creditor of the payee.

Affirm the decree.

NOTE—Where an answer to a bill relies on new facts, by way of discharge or avoidance, or defence not responsive to the bill, they must be established by independent proof. The answer is not evidence of them. 3 Mason, 378: Sumner, 478: 12 Peters, 178: 10 Yerger, 109.

As to when the answer of a defendant is not evidence, for or against a co-defendant. See 2d Condensed Rep. 319, 285: 5th Condensed Rep. 741: 4th Condensed Rep. 170: 3 Paige, 273.

ALLISON vs. TYSON.

In all cases of fraud, and damage resulting immediately therefrom, an action lies at the suit of the party injured.

This action of trespass on the case was brought in the Circuit Court of Lewis county, by Tyson and wife, Nancy, against Allison, and was tried by Judge Dillahunt and a jury, at the January term, 1844, and resulted in a verdict and judgment in favor of the plaintiff for \$400. ²

The defendant appealed. All the material facts are stated in the opinion of the court.

Baxter and Thomas, for plaintiff in error.

Cahal, for defendants in error.

He cited *Upton vs. Vail*, 6 John. 183: 4 Kent, 190: 6 Cow. 346: 1 Wend. 347: 2 Wend. 385: 7 Wend. 1: 2 Leigh's N. P. 1076.

GREEN, J. delivered the opinion of the court.

This is an action on the case, brought by the defendant in error, to recover damages for an injury done by reason of the fraud of the plaintiff in error. The declaration alleges, that Nathan A. Forest, the son of the plaintiff, Nancy, purchased a horse of the defendant, for the use of his mother as a riding horse, and that the defendant represented, that the horse was gentle and suitable for the said Nancy to ride; whereas, the said horse was vicious, easily frightened, and accustomed to runaway; all which was well known to the defendant; and that the said Nancy relying on the said false representations of the defendant, and not knowing the contrary thereof, rode the said horse, and when so riding, the horse ran off and threw the said Nancy, and kicked and tramped upon her, whereby she was greatly wounded, bruised and injured, &c.

The defendant pleaded not guilty. The jury found for the plaintiffs four hundred dollars damages. The defendant moved in arrest of judgment, which was overruled—he also

[Allison vs. Tyson.]

moved for a new trial, which was refused, and he appealed to this court.

This is a novel case in its facts and circumstances, but it depends upon principles that have long been recognized both in English and American courts. It is one of the oldest principles of the common law, that in all cases where a person sustains a temporal loss, or damage by the wrong of another, an action on the case lies at the suit of the party injured to repair the damage. 1 Com. Dig. 78, *Action on the case*. Whether this wrong be done to one's property, or by fraudulent representations affecting the value of an article sold, or by fraudulent representations upon other subjects, the immediate effect of which is an injury to the party to whom they were made, can make no difference in principle. In either case, the damage results from the wrong of the other party, and he ought to repair it.

The case of *Pasley vs. Freeman*, 3 T. R. 51, was an action for falsely and deceitfully representing, that a party was solvent and able to pay, whereby the plaintiff was induced to give him credit, and by reason of his insolvency the debt was lost. All the Judges, with the exception of Grose, J., held that the action should be sustained. Not that the telling of a bare naked lie is actionable, but that the falsehood was told with a view to deceive and impose upon the plaintiff. The case of *Pasley vs. Freeman*, has been constantly referred to as testimony, in the English courts, ever since it was decided. The same principle is recognized and adjudged by the Supreme Court of New York, in the case of *Upton vs. Vail*, 6 John. Rep. 181; that was a suit against Upton for "falsely and deceitfully" recommending one Daniel Brown to Vail, as a man of property, whereby Vail was induced to give credit to Brown, and afterwards lost his debt. Ch. J. Kent, in delivering the opinion of the court, says: "But independent of the English cases, I place my opinion upon the broad doctrine, that fraud and damage, coupled together, will sustain the action." The case of *Allen vs. Adlington*, 7 Wend. R. 1, goes farther than either of the cases above referred to. In that case, Allen was induced to sell goods on a credit to Baker by means of a letter which Adling-

[Allison vs. Tyson.]

ton addressed to Wilson, and which was shown to Allen's clerk. In the letter to Wilson, Addington says: "Mr. Baker is going to your city to buy goods; he has been a merchant some years at Aurora, Erie county; has bought his goods at Buffalo, Utica, and elsewhere, heretofore. Any assistance you may give him by way of buying, would be thankfully acknowledged, he being an acquaintance of mine." This letter was delivered to Wilson by Baker, who afterwards referred Allen's clerk to Wilson. The facts stated in the letter were true, but Addington, the writer, knew at the time he wrote it, that Baker was insolvent. He held two judgments himself against Baker, amounting to near \$1,500, and a warrant of attorney to confess a judgment for \$760. He was Baker's uncle, and advised him to go to New York and get what goods he could. All these facts were concealed, and Baker obtained the goods upon the implied recommendation in Addington's letter to Wilson.

After Baker had obtained the goods, he was sold out by Addington, who bought all the goods himself. The action in this case was sustained. The court say: "It must, therefore, be considered as settled, both in England and in this State, that an action lies for a false recommendation of a third person, by which the plaintiff sustains damage, provided such recommendation be made with the intention to deceive and defraud the plaintiff. Such information must be communicated to the plaintiff, and must be relied on and cause the damage.

If a person intending to defraud somebody, gives a general recommendation of credit to an insolvent person, any one who sustains damage by reason of such recommendation, is entitled to an action for such damage, grounded on the fraud. See also the case of *Yeates vs. Joyce*, 11 John. R. 136, and the case of *Aldridge vs. Stuyvesant*, 1st Hall's R. 210, where the action on the case is sustained upon the same principle, though, in application to a state of facts, somewhat different. And in the late case in the English Court of Exchequer, of *Langridge vs. Levy*, 2 Meeson & Welsby, 519, the principle under discussion, was applied to a state of facts, very similar to the case now before the court. The plaintiff's father purchased of the defendant a gun, for the purpose of being used by himself and his sons,

[Allison vs. Tyson.]

which the defendant falsely warranted to have been made by N. (a gun maker of distinction,) and to be safe and secure, knowing at the same time that the gun was not made by N., and that it was composed of inferior materials. And shortly after the purchase the plaintiff lost his arm by the explosion of the gun while using it. It was held, that an action on the case for a fraudulent misrepresentation lay against the defendant, for he had knowingly sold the gun to the father, for the purpose of being used by the plaintiff, and had knowingly made a false warranty, that it might be safely used, in order to effect the sale; and the plaintiff believing the representation to be true, used the gun, whereby he sustained the damage. There was fraud, and damage, the result of that fraud, not from any act remote and consequential, but one contemplated by the defendant at the time, as one of its results. The court says: "We decide that the defendant is responsible in this case for the consequences of his fraud, while the instrument was in the possession of a person, to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

It seems, that if the gun had been used by a person, not in the contemplation of the defendant at the time he made the representation, he would not be responsible. See 2 Leigh's N. P. 1076.

These cases show, that wherever a party is guilty of a fraud, and injury results as the immediate consequence to the person on whom the fraud was practised, an action will be sustained to repair the damage. The motion in arrest of judgment was, therefore, properly overruled.

2. But it is said, the evidence did not authorize the verdict, and that a new trial ought to have been awarded. We do not think so. The evidence shows, that Allison knew that Forest wished to purchase the horse for his mother to ride, and that she desired a gentle horse; and although he did say, a woman's saddle had never been on the horse; yet he said, if Mrs. Tyson was a good rider the horse would suit her. He spoke of the service the horse had been engaged in, under the management of a negro woman, in a way calculated to give assurance that

[*Hughlett vs. Hughlett et als.*]

he was gentle; and he suppressed the fact, that the horse had run off with his son, had thrown himself on one occasion, and was in fact, a wild, vicious, and ungovernable animal. The plaintiff, Nancy, rode the horse on the faith of Allison's representation of his fitness for that service, and while so riding him, he took fright, plunged and threw her off, kicking her as she fell, by which means she was greatly injured, her life endangered, and she is rendered a cripple for life.

We think the jury were warranted from this proof, to render the verdict in this cause.

Affirm the judgment.

HUGHLETT vs. HUGHLETT et als.

1. Joint executors, executing a joint bond with sureties, are each responsible to creditors and distributees for the defalcation of the other before the sureties.
3. The sureties of an executor are not responsible for the proceeds of the sale of real estate directed to be sold by testator before the act of 1837-8.

William T. Hughlett died in Hickman county, in 1827, and Thomas D. Porter and W. H. Hughlett being appointed executors, qualified as such, and gave a joint bond, with Joel Walker and J. S. Russwurm as sureties for the due administration of the estate.

The will directed the sale of the real estate, and a distribution of the proceeds. The executors returned a joint inventory, consisting of real and personal estate. They engaged jointly in the performance of the trusts, sold and conveyed portions of the real estate, and received the proceeds. No settlement took place between the executors, and Porter died in 1837, and N. Adams and C. M. Porter were appointed his executors.

This bill was filed in the Chancery Court at Franklin, by John Hughlett against Wm. H. Hughlett, surviving executor, and against Adams and Porter, executors of Thomas D. Porter, and against the legatees of the testator, Wm. H. Hughlett,

[*Hughlett vs. Hughlett et al.*]

seeking an account of the administration of the estate of W. T. Hughlett.

The defendants answered, and the case was heard on bill, answers, replications and proofs, before Chancellor Bramlitt. He discharged the sureties as to the proceeds of the sale of real estate, and directed an account to be taken, the particulars in reference to which it is not material to the questions decided by the court to set forth.

Alexander, for complainant.

There is error in the decree, in this; the court discharged Joel Walker and John S. Russwurm, the sureties in the executors bond, from all liability thereon, so far as regards the proceeds of the land devised by the will to be sold and converted into money; whereas, the law is, that the lands were converted into personal property by the will, and were so considered by the executors, who returned an inventory thereof, and gave an executor's bond in the penalty of \$20,000, covering the land, as the personal property did not exceed \$400 after deducting specific legacies.

The act of 1715, ch. 48, sec. 5, (C. & N. 71,) directs an administrator to give bond to administer the goods, chattels and credits of his intestate.

The act of 1813, ch. 29, sec. 3, directs executors of every description, before they presume to enter upon the administration of any estate whatever, to enter into bond and security, in the same way that administrators are required to do.

The executors then had to give bond and security for the goods, chattels and credits of Wm. T. Hughlett, and the question is, whether these terms comprehend the land devised by the will, to be sold by the executors immediately, and turned into money. These terms comprehend all the personal property of the estate, and the lands devised to be sold, were by the will converted into personal property from the time of the testator's death, as will appear from the following authorities. See Story Eq. sec. 790-91: *Williams Ex'rs*, 414-17: *Ram. on Assets*, 148, 204, 206: in 8 *Law Lib.*: 5 *Law Lib.* 4, 5, 16, 17, 48, 57: 7 *Yerg. R.* 615: 3 *Hay R.* 109, 115: 3 *Wheat.*

[*Hughlett vs. Hughlett et al.*]

R. 563, 576, 583-4: 24 Wend. R. 641, 659, *et seq.*: 1 Brown C. R. note 138, *Kennell vs. Abbott*, 4 Ves. R. 802, 810: 4 Hill R. 492 to 503.

Lands thus devised, then, become converted "out and out" into goods and chattels; and the question now is, whether the bond covers them, or whether they are a species of goods and chattels not comprehended by the bond. To maintain that they are not comprehended by the bond, the defendants will have to show an exception in the statute to that effect, according to the rule stated in *Cock & Jack vs. McGinnis*, Mar. & Yerg. R. 361, and there is no such exception.

The meaning of the terms goods and chattels in our statute, will not be restricted to the meaning the English gave to their administration bond, taken according to their statute 22 and 23 Car., unless our statute make such restriction, which is not done; but the words goods and chattels in our statute, are left in their full legal meaning, comprehending lands converted into money or the proceeds thereof.

The case in 3 Randolph R. 488, which holds a different doctrine, is not the law in our State, for the reasons following:

1. Because it adopts the restricted meaning given to the English administration bond.

2. Because the form of the executor's bond is given by the statute of Virginia, 1792, Revised Code, 92, to which they have given that restricted meaning.

3. Because they say, the power to sell lands given by will to an executor, creates a trust, which the executor, as such, is not bound to execute. This may be so in some cases, but in the case now before the court there is no trust, not even to sell on credit, or to lend out the money, but the lands were to be turned into money immediately and paid over.

4. Because our statute does not prescribe a form of an executor's bond, but leaves that to be varied to suit every will that might be made; 9 Pick. R. 404: 13 do. 331-2; and in this respect our law is similar to that of Massachusetts, where no executor's bond is prescribed: still their statutes require an executor "to give bond in the same manner administrators are by law obliged to be bound." And in that State executors and

[*Hughlett vs. Hughlett et al.*]

their sureties are liable on the bond for the executor's execution of the trusts of the will.

5. In England their Ecclesiastical Court has jurisdiction of the probate of wills bequeathing personal property, but not of a will devising lands. If this is any reason why an executor there would not, as such, have jurisdiction over lands converted by the will into personal property, that reason ceases in our State, where the same tribunal takes cognizance of the probate of wills of both personal and real property.

6. It must be admitted to be the law, that a man may devise or bequeath a part of his property real or personal and die intestate as to the balance.

Now, in order to test the principle contended for by the defendants' counsel, let us suppose a man devised his four tracts of land exactly as the testator did here, and either had no other property, or chose to die intestate as to the balance of his property real and personal; would the executor to such a will have to give bond and security according to the act of 1813? The answer is, he certainly would. But according to the argument of the gentleman the sureties in such bond would not be bound, which would be absurd and not according to the intention of the law. The sureties in such a case would be bound for the acts of the executor in selling the lands and paying over the proceeds to their full value, or they would not be bound at all.

Then, if the sureties in such a case would be bound as above stated, they would also be bound if the testator had put in the same will a part or the whole of his property, the principle being the same.

Marshall, for the sureties, contended:

1st. That no *devastavit* has been committed by William H. Hughlett, or by Thomas D. Porter, in his lifetime, in regard to his goods and chattels, rights and credits at the time of his death; if there were, the same was committed by both executors.

2d. That they being only sureties in the executor's bond, are not liable for any breach of trust by either of the executors, in regard to the lands of the testator, or the proceeds of the sales

(Hughlett vs. Hughlett et al.)

of them. Acts of 1715, ch. 48, sec. 5: 1813, ch. 119, sec. 3: See 1837, ch. 111, sec. 18: 1 Williams on Ex'rs, 23: 2 *Ib.* 640, 414, 335: 2 Williams on Ex'rs, 694: *Lex Testamentaria*, 524, 526: 2 Randolph Rep. 483, *et seq.*: 3 Leigh Rep. 89, *et seq.*: 17 Com. Law Rep. 428: 8 Com. Law Rep. 103: 7 John. Chan. Rep. 48: 1 Dev. & Bat. Rep. 393: 11 Ser. & Rawle, 441: 2 Dev. & Bat. Rep. 262: See also 2 Williams on Ex'rs, 1033-6-7: 5 Peters Rep. 160: 1 Brown C. C. 138, in note: 5 Law Lib. 1: 6 *Ib.* 8 to 12, 59, 87, 137: 9 *Ib.* 73.

3d. That if they should be considered so liable, no breach of trust has been committed by one executor, that the other is not liable for, in regard to the lands or their proceeds, even in case no executor's bond had been given, and this liability would be before the liability of the sureties. 10 Yerg. Rep. 263, *Deaderick vs. Cantrell*.

4th. They having executed the executor's bond as the sureties of William H. Hughlett and Thomas D. Porter, as executors; Wm. H. Hughlett and Thomas D. Porter are principals in the bond as to them, and will both be primarily liable, as to any breach of trust or *devastavit*, for which they (Russwurm and Walker) are liable on said bond. 2 Connecticut Rep. 536-7, *et seq.*: 1 McMullen Rep. 444-5: 2 Brockenboro' Rep. 159, 403: 2 Dev. Eq. R. 119: Theobald on Pr. and Surety, 160, 270, (side): 3 Monroe, 95: 9 Vermont R. 41.

Washington, for Porter's executors.

F. B. Fogg, for the sureties.

The case of *Deaderick's legatees vs. The Securities of Cantrell and Wharton*, now pending in the Circuit Court, in which Mr. Meigs has furnished a brief or notes to the court, is probably in many respects different from that of *Hughlett vs. Hughlett*. The substance of *Deaderick's* will is stated in 10 Yerg. Rep. 262, whereby it appears, that the executors were to sell his real estate in four equal annual instalments; they were to invest the money arising from the sales, loan it out, and pay it over to the minors when they married or became of age. The trusts continued for nearly twenty years, and the powers giv-

[Hugblett vs. Hugblett et als.]

en to the executors were as ample as the testator himself possessed.

I contend that the sureties of the executors are not liable for the trusts of the real estate, on all bonds executed previous to the statute of 1838. The word executor, as used in our statutes, has no statutory definition. Executors are never spoken of as having any thing to do with real estate; they are to qualify before they enter upon the estate, in the very words of the English statute, they are to make an inventory of the goods, chattels, rights and credits, and "the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, or which at any time," &c. the very words used in the condition of the bonds of the administrator in this country and in England. See 1st Williams on Executors, p. 332-3. Our County Court had no jurisdiction to demand accounts, or inventories of real estate, and in truth had no more power as a Court of Probate, than the Ecclesiastical Court, except, that the probate of a will was conclusive, as well as to real as to personal estate, and instead of proving a will on every trial about real estate, one issue was to settle the whole controversy as a question of evidence.

What is the meaning of the word executor? Williams, p. 112, 1st vol. defines it to be "the person to whom the execution of the last will and testament of personal estate is, by the testator's appointment confided." Toller, p. 30. "An executor is he, to whom the execution of a last will and testament of personal estate is by the testator's appointment confided." Matthews' 9th Law Library, last treatise in that volume, defines it in the same way, and says: "With real property, executors and administrators, as such, have nothing to do." Now, because a testator confers upon the same person whom he has appointed executor, the superintendence of the disposition of his real estate, therefore the sureties are liable upon his administration or executor's bond, which refers to nothing but personal estate and effects; this would seem to require, as in Massachusetts, some positive statutory provision. By our laws, he is to make an inventory as an administrator; he is to distribute in

[*Hughlett vs. Hughlett et al.*]

two years; he is to take bond from the legatees to refund in case debts appear.

If the proceeds of real estate, sold by the executor, were assets for which a surety was accountable, would not an administrator *de bonis non*, with the will annexed, be entitled to recover them? But this cannot be done, even where the devise was to pay debts. 1 Barnwell & Cresswell, 364: 8 Common Law Rep. 103. The two characters, say the Judges, of trustees and executors are united in the same persons, but the devisees to them are as trustees. Best, Judge, says, a trust is plainly created, and the trustees are the persons to dispose of the money, and when a trust is once created, a claim by any other person can only be enforced in equity.

Ever since the time of Lord Hardwick, and the case of *Lewin vs. Okey*, 2 Atk. 50, it has been uniformly decided, that the portion of the estate which consists of the proceeds of the sale of real property, are equitable and not legal assets. The testator, as Lord Tenterden observes, in 9th Barnwell & Cresswell, 489, "cannot alter the legal character of the property, by directing that it should be considered as part of his personal estate." The property so situated, is not embraced within the words, "goods and chattels, rights and credits," &c., specified in the bond.

There the power created by the will is co-extensive with the power of the testator himself. Is not this power and trust derived entirely from the will, and does it require the qualification of the executor by our laws, or letters testamentary by our probate authority for a valid exercise of the power to convey real estate? Chancellor Kent, in *Doolittle vs. Lewis*, 7th vol. J. p. 48, says: "The probate of the will is not necessary to the execution of a power to sell lands, and adds no force to it." Can I not say, that although a probate or recording of the will be necessary in this State, yet letters testamentary are not. For instance, many thousand acres of land are held in this State under deeds from executors, appointed by testators, domiciled in other States. The executors have never qualified in this State, or given bond here, or obtained letters testamentary here. Under the act of 1823, ch. 31, a copy of the will has been filed

[*Hughlett vs. Hughlett et al.*]

and recorded, the executors have qualified in other States, and executed deeds here. Are these deeds void, because the executors, *qua* executors, have never qualified or given bond here? I know of more than a hundred thousand acres that have been conveyed in this way, upon the supposition that the words "to pass land and other estate," in our act of 1823, referred as well to a power, as to an interest in land. Several of these conveyances have been brought before this court. One in the case of *Wiley's lessee vs. Conrad*, and the other *Catron vs. Gaines' lessee*, where the deeds were executed by executors that never qualified in this State. The foreign executor is not recognized; he could not bring suit, but as a trustee authorized to convey land he is recognized, provided the will is proved and recorded according to our act of 1823, or before that act, if the original will had been produced and proven by the witnesses before the County Court where the land was situated, or proved as at common law.

The cases in Virginia, referred to by Mr. Marshall, are believed to be decisive, as the executor's bond there is substantially the same as the bond here. If the words "goods and chattels, rights and credits," &c. do not embrace proceeds of real estate, surely the sureties are not liable.

The decisions of Massachusetts are founded on the words of their statutes of 1763 and 1817. It is a breach of an executor's or administrator's bond, to neglect to apply for a license to sell real estate, when it is necessary to do so, and since the acts of 1817, both executors and administrators are required to inventory real estate.

TURLEY, J. delivered the following opinion of the court.

On the 12th day of January, 1827, Wm. T. Hughlett made and published his last will and testament, by which (after specific legacies) he disposes of the residuum of his estate in the following manner: "All the balance of my estate, both real and personal, of every kind and description whatsoever, and all debts, dues and equities of what kind soever, that is not already disposed of, I will and require that my executors should

[*Hughlett vs. Hughlett et al.*]

take and convert into money immediately, to the best advantage, and thereupon to pay and discharge all just demands that may hereafter arise against me; and after that is done, to pay to the legatees their distributive shares equally. And should it so happen, that any of the legatees, who have already received real or personal estate bequeathed to them, should lose the same by older or interfering claims, then my executors are to make the deficiency good to them out of the funds of the real and personal estate above required to be sold, if there is enough so to do."

This will was proven at the April sessions of the County Court of Hickman, 1827, by Thomas D. Porter and William H. Hughlett, the executors, who entered into bond, with Joel Walker and John S. Russwurm, to the Governor of the State for the time being, conditioned as follows:

"The condition of the above obligation is such, that whereas the above bounden Thomas D. Porter and Wm. H. Hughlett, being appointed executors of the last will and testament of Wm. T. Hughlett, deceased, and now qualified as such according to law, do make or cause to be made a true and perfect inventory of all and singular the goods and chattels, rights and credits of the deceased, which have or shall come to the hands, knowledge or possession of the said Thomas D. Porter and Wm. H. Hughlett, or into the hands or possession of any person or persons for them, and the same so made, do exhibit on oath to the court of the county aforesaid within ninety days from the date of these presents; and the same goods and chattels, rights and credits of the deceased, at the time of his death, or which at any time hereafter, shall come into the hands or possession of the said Thomas D. Porter and Wm. H. Hughlett, or into the hands or possession of any person or persons for them, do well and truly administer according to law, and surrender up such legacies to the persons to whom they are bequeathed agreeably to the last will and testament of the deceased, and further do make, or cause to be made, a true and just account of said administration within two years after the date of these presents, and all the rest and residue of said estate, which shall be found remaining upon said executors' account,

[*Hughlett vs. Hughlett et al.*]

the same having been first examined and allowed by the court of said county, shall deliver and pay unto such person or persons respectively to which the same shall be due agreeably to the act of assembly in such cases made and provided, then this obligation to be void and of no effect, otherwise to remain in full force and virtue."

Thomas D. Porter and William H. Hughlett, the executors, having thus proven the last will and entered into bond, proceeded to administer the estate, and to perform the trust imposed upon them; a joint inventory was returned by them on the 9th of April, 1827, which specifies as the property of the estate, one thousand acres of land in Hardeman county, Tennessee, six hundred and forty acres of land in Hardeman county, Tennessee, out of which the locator is to have four hundred acres, five hundred acres of land in Obion county, Tennessee, one note on Elias Jones, Jr., \$5 62½, Wm. Chelton's receipt for notes for collection, \$57 62½. They continued the joint performance of the duty they had thus taken upon themselves, till some time in the autumn of the year 1837, when Thomas D. Porter died. During this period, all the lands of the estate, or the greater part of them, were sold by them under the provisions of the will, and the money received by one or both. Nothing appears to have been done by the surviving executor afterwards.

On the 19th of September, 1839, this bill was filed by John Hughlett, one of the legatees and devisees under the will, against Wm. H. Hughlett, the surviving executor, the executors of Thomas D. Porter, deceased, and the other legatees and devisees, seeking an account of the administration of the estate, and the execution of the trust under the will of Wm. T. Hughlett, deceased, against the executors and their sureties.

The most difficult and important questions presented for the consideration of the court, are questions of law, arising out of the construction of the liabilities of the executors, as administrators of the personal estate of the deceased, and as trustees for the sale and distribution of his real estate, under the will, and the consequent liability of their sureties thereon.

It is contended for the sureties: 1st. That as the bond of the

Hughlett vs. Hughlett et aln.]

exécutors is joint, they are to be held jointly responsible for each other, for any liability arising under it, and are to be charged as principals, responsible each for each to the sureties, and that as long as either of them are able to make good any defalcation, for which they are liable under the bond, he shall be so held in preference to the sureties.

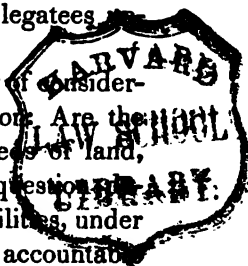
This proposition is too plain to admit of dispute. The executors might have given separate bonds, and thereby have been held separately liable. But this they have not done, but have chosen to enter into a joint bond, and the necessary consequence is, that the sureties are bound for them jointly and not individually and separately.

2. It is contended for the sureties, that they are not bound under the bond for the performance of the trust reposed in the executors to sell the lands of the testator, and appropriate the proceeds to the payment of his debts, and to the legatees under the will.

This is a much graver question, and one worthy of consideration. It may be reduced to this simple proposition: Are the sureties of an executor responsible for the proceeds of land, devised to be sold by him? The solution of this question depends upon the nature of his duties and responsibilities, under such a devise, and how and where he is to be held accountable for their performance.

In order to arrive at a correct understanding upon this subject, it will become necessary to enquire; 1st. How it is adjudged by the common law. And 2d. What changes, if any, have been effected in relation thereto by statutory provisions of the State of Tennessee.

The duties of an executor and administrator, in relation to the administration of goods and chattels, rights and credits, are the same, with the exception, that administrators, after the payment of debts, are bound to distribute the surplus, according to the statutes of distribution; but the executors must pay specific legacies, in addition to debts, before distribution. An executor, as such, has no more right to interfere with the real estate of his testator, than has the administrator with that of his intestate, unless he be authorized so to do, by express power



[*Hughlett vs. Hughlett et al.*]

delegated to him in the will. An executor then may act in a double capacity, viz, as administrator of the personalty, and as trustee executing a power. It is then necessary in this branch of the subject, to treat of his duties and responsibilities in both these capacities.

In ancient times, if a man died without making any disposition of his goods and chattels, the King as *parens patriae* seized them, to the intent, that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, if not, those of his blood. Afterwards the Crown, in favor of the Church, invested the Prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care or charge of the transitory goods of the deceased, than the Ordinary, who all his life had the care and charge of his soul. This trust was abused by the Ordinary, who under the name of pious uses, took the whole residuum of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying the lawful debts and charges thereon. This produced the statute of West. 2d, 13th, Ed. 1st, ch. 19, which enacted, that the Ordinary should pay the debts of the intestate, so far as his goods extended, in the same manner that executors were bound, in case the deceased had left a will. Yet the residuum, after the payment of his debts, remained still in his hands, to be applied to whatever purpose his conscience should approve. The flagrant abuses of this power produced the passage of the statute of 31st, Ed. 3d, sec. 1, ch. 11, which provides, that "in case where a man dies intestate, the Ordinary shall depute the next and most lawful friends of the dead person, intestate, to administer his goods, which deputies shall have an action to demand and receive, as executors, the debts due to the said person intestate in the King's Court, for to administer and dispend for the soul of the dead; and shall answer, also, in the King's Court, to others to whom the said dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the Ordinaries as executors are in the case of a testament, as well of the time past, as the time to come." 1st Wil. Ex'rs. 236.

[*Hughlett vs. Hughlett et al.*]

This is the origin of administrators, as they are at present in England. They are officers of the Ordinary, appointed by him in pursuance of the statute, and their title and authority are derived exclusively from the Ecclesiastical Judge, by grants, denominated letters of administration.

This was doing much to secure a correct administration of the effects of deceased intestates. But something still remained to be done to make the security effectual; the administrator might waste the effects, and be unable to answer personally for them. This defect was remedied by the statutes of 21st Henry 8th, ch. 5, sec. 2, and 12th and 23d Charles 2d, ch. 10, sec. 1.

The statute of Henry directs the Ordinary to grant administration, taking security of him or them, to whom shall be made such commission. That of Charles, further provides, that "all Ordinaries, as well as Judges of the Prerogative Courts of Canterbury and York, as all other Ordinaries and Ecclesiastical Judges, having power to commit administration of the goods of persons dying intestate, shall and may, upon their respective granting and committing of administration of the goods of persons dying intestate after the 1st day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the Ordinary, with the condition in form and manner following, *mutatis mutandis*, viz,

"The condition of the above obligation is such, that if the within bounden A B, administrator of all and singular, the goods, chattels and credits of C D, deceased, do make, or cause to be made, a true and perfect inventory of all and singular, the goods, chattels and credits of said deceased, which have or shall come to the hands, possession or knowledge of him the said A B, or into the hands or possession of any other person or persons for him, and the same so made, do exhibit, or cause to be exhibited in the registry of — court, at or before the — day next ensuing, and the same goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A.B. or into the hands and possession of any other person or

[*Hughlett vs. Hughlett et al.*]

persons for him, do well and truly administer according to law: And further, do make, or cause to be made, a true and just account of his said administration, at or before the — day of —, and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon said administrator's account, the same being first examined and allowed by the Judge or Judges, for the time being, of the said court, shall deliver and pay unto said person or persons respectively, as the said Judge or Judges by his or their decree or sentence, pursuant to the true interest and meaning of this act, shall limit and appoint. And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named, do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A B, within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of said testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue."

Such is the condition of the bonds of administrators in England at this day, and such is substantially also in this State.

But the Ecclesiastical Courts in England, to which the jurisdiction of the probate of wills also belonged, never had authority to require of an executor a bond for the due administration of the assets, 4th Burns Ecclesiastical Law, 176, but had the power at the common law to demand a bond from administrators with the will annexed, as well as administrators in cases of intestacy, with a condition to exhibit an inventory, and to administer truly, by paying debts and legacies, as appears from the case *Folke vs. Dominique*, 2d Strange, 1137, where it was adjudged, that a bond given *durante minore etate*, with the will annexed, upon such condition, though not coming within the statute of 21st Henry 8th, was good at the common law, as to the payment of legacies, that being a subject of Ecclesiastical jurisdiction. This statute of Henry 8th, only provides, in addition to cases of intestacy, that in case of an executor refusing to prove the will, the Ordinary shall take from him, to whom the administration is granted, security for the true administra-

[*Hughlett vs. Hughlett et als.*]

tion of the goods, chattels and debts. 4th Burns' Ecclesiastical Law, 204.

The duties of an executor and of an administrator, with the will annexed, are identically the same in respect to rendering an inventory and account to the Ordinary, and as to the payment of debts and legacies. Toller's Law of Executors, 490. The engagements of the one and the other are the same, the executor being bound by his oath and the duty of his office, and the administrator, with the will annexed, in addition to these obligations, by his bond. The oath of an executor as given by Toller, in his Law of Executors, 58, is, "that he will truly perform the will, by paying first, his testator's debts, and then the legacies therein contained, as far as the goods, chattels and credits will extend, and the law charges him, and that he will make a true and perfect inventory of all the goods, chattels and credits, and exhibit the same in the registry of the Spiritual court, and render a just account thereof when lawfully required."

This all shows, that so far as the Ecclesiastical Courts were concerned, the duties of executors, administrators of intestates, and administrators with the will annexed, were the same, being confined to the disposition of the goods, chattels and credits of their testator or intestate; the distribution of effects of the one being under the will, and of the other under the statutes of distribution: and the great and material difference between them is, that it is the duty of the court to take a bond from administrators, and that it has no power to exact one from executors. And the reason of this difference is obvious. In the case of wills, the testator appoints the executor; he is supposed to have full knowledge of his capacity for performing the duties of his office, and full confidence in him, and, therefore, there is no necessity for the Ordinary to require a bond—but not so in the case of administrators; there is no confidence reposed in them by the intestate; they are appointed by the Ordinary, who may have but little if any acquaintance with their fitness or responsibility for the office, and a bond with satisfactory security becomes necessary for the safety of the estate.

[*Hughlett vs. Hughlett et al.*]

The Ordinary having no power to exact a bond from an executor, if he attempt to do so, a writ of prohibition may be had, and if the bond be taken it is void. Lev. 233.

The Ecclesiastical Courts, then, having no power to exact or receive a bond from an executor for the payment of debts or legacies arising out of personal estate, or the distribution of the residue of goods, chattels and credits, things peculiarly within their jurisdiction, it will follow *a fortiori*, that they have no power so to do, in cases excluded from their jurisdiction. This brings us to the second branch of the proposition under consideration; that is, what are the duties and responsibilities of an executor in executing a devise to sell real estate, and appropriate the proceeds either in the payment of debts or legacies.

This is a question of authority. In 14 Viner, 468, pl. 14, it is laid down, that "the proceeds of land given by the testator for the payment of debts and legacies, are not testamentary, and the executors are not bound to put such proceeds into the inventory. The Ecclesiastical Courts never had jurisdiction to enforce the payment of legacies out of the proceeds of land devised to be sold, that not being a testamentary subject." Dyer, 151: Palm. 120: 2 Show. 50, pl. 36: Hob. 265. It was a mere trust, which at all times could only be enforced in a Court of Equity.

In the case of *Clay et als, adm'rs, de bonis non, vs. R. Willis, surviving ex'r*, 8 Com. Law Rep. 103, it was held by the Court of King's Bench, composed of Bayley, Holroyd and Best, that a devise of an equitable interest in land for the payment of debts, constituted the proceeds equitable assets, because the devise was in trust to pay debts. Bayley, Judge, said, upon this point: *Leven vs. Oakly*, 2 Atkins 50, is precisely in point; that was followed by *Silk vs. Prime*, 1st Brown Cha. Ca. 138, in which all the cases were carefully considered, and *Newton vs. Binnel*, 1st Brown's C. C. 134, to the same effect. And these cases have been since confirmed by Lord Chancellor Eldon, in *Bailey vs. Eakins*, 7 Vesey, 319, and *Sheppard vs. Luwidge*, 8 Vesey, 26. Upon these authorities and others referred to, the whole court declared themselves satisfied, that the assets sought to be recovered, were equitable and not legal, and non-suited

[*Hughlett vs. Hughlett et als.*]

the plaintiff. In the case of *Baker, ex'r*, vs. *Charles May and others*, 17 Com. Law Rep. 426, a testator devised to his executors, their heirs and assigns, his lands upon trust, to sell the same, and directed that the money arising from the sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold, and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will, and among other dispositions, he bequeathed a legacy to A B: it was held by the Court of King's Bench, Lord Tenterden Ch. J., that the money arising from the sale of the real estate was equitable assets, and that the legatee could not maintain a suit in the Ecclesiastical Court to recover his legacy.

Mr. Williams in his Treatise upon Executors, p. 1033, says: "Hitherto the subject has been confined to the consideration of assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt due from the testator, might bring forward in evidence to disprove the executor's plea of *plene administravit*. But there are besides various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law, and which, therefore, if administered at all, must be administered in equity. This latter portion of the estate in the hands of the executor or administrator is called equitable assets, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the temporal courts, and legacies in the spiritual, by the course of law. Equitable assets are such as are liable only by the help of a Court of Equity." Many other authorities to the same point, might be adduced, but these are amply sufficient to establish the propositions; that the lands devised to be sold for the payment of debts or legacies, are not administrable as legal assets; that the executor acts in relation to them as trustee, and not as executor of personal effects; that no suit can be brought at law in relation thereto, nor in the Ecclesiastical Courts; that they are equitable assets, cognizable only in a

[*Hughlett vs. Hughlett et als.*]

Court of Chancery; that the executor is not bound to return them in his inventory to the Court of Ordinary; that neither the oath of an executor, nor the oath and bond of an administrator, with the will annexed, extends to them, but are confined exclusively to those duties which devolve upon them purely in the character of executor or administrator, and which the Ordinary had the right to exact the performance of.

This brings us to the discussion of the 2d general proposition in relation to the subject under consideration, viz, what changes, if any, have been effected upon this subject, by the statutory provisions of the State of Tennessee?

Having no Ecclesiastical Courts in our country, it became necessary at an early period to appoint some other tribunal for the probate of wills, and the granting of letters of administration upon intestate estates. Accordingly it was enacted in the Colony of North Carolina in 1715, ch. 48, sec. 4 and 5, that no person shall enter upon the administration of any deceased person's estate until he has obtained letters of administration, or letters testamentary, under the penalty of one hundred and twenty-five dollars; and that the Clerk of the County Court shall not sign and issue any letters testamentary without taking the executor's oath for the performance of the will of the deceased, or letters of administration, without the administrator has taken the oath of the administrator, and also has given sufficient bond, with two or more able sureties, taken before the County Court, respect being had to the value of the estate, in the name of the Governor, for the time being, with the condition in the form and manner following, to be changed as the case may be. This condition, which it is unnecessary here to quote, is strictly in substance, and almost in form the same with that given by the statute of 22d and 23d of Charles the 2d, ch. 10, sec. 1, which we have already quoted verbatim. This statute of 1715, only changes the forum, and leaves the duties and responsibilities of executors and administrators precisely as they were after the passage of the statute of Charles. Various other statutes were enacted between that period and 1813, relating exclusively to the mode of administering and distributing the estates of deceased persons; but having noth-

[*Hughlett vs. Hughlett et als.*]

ing to do with the enlargement or creation of new sureties for the faithful performance of their duties by executors or administrators.

An act was passed in 1813, chap. 11, which provides that "all executors of every description shall, before they presume to enter upon the administration of any estate whatsoever, enter into bond and security in the same way that administrators are required to do, unless the testator shall otherwise expressly provide by his will, in which case no bond or surety shall be required, unless thereafter some creditor or creditors, or the representative or representatives of such testator shall apply to the court of the county, and suggest by petition that said executor or executors are wasting, or likely to waste the estate of his or their testator; whereupon it shall be lawful for such court, and they are hereby required to direct said executor or executors, on satisfactory proof being made to said court of the truth of said complaint, and proof also being made that ten days notice in writing has been given to said executor or executors, to enter into bond and security as other executors are by this act required to do; and in case said executor or executors shall fail to enter into bond with satisfactory security within three days after said order is made, said court shall proceed to appoint an administrator for said estate, who shall forthwith proceed to call said executor or executors to account for said estate, who shall give bond and security and be qualified as other administrators are required by law, and shall dispose of said estate agreeably to the last will and testament of such deceased."

This is the first and last act requiring executors to give bond and security: how is it to be construed?

We have seen that where a testator devises personalty for the payment of debts and legacies, and also lands to be sold by his executors for the same purposes, the executor acts in a double capacity, viz, as administrator of the personal property and as trustee for the execution of powers under the will; that the assets in the one case are legal, recoverable by the debtors of the testator in a court of law and by the legatees in the ecclesiastical courts; that in the other they are equitable, and can

[*Hughlett vs. Hughlett et alr.*]

only be reached in a court of chancery. This principle has been in no wise changed in this State by legislative enactment; the only difference which exists here in relation to the subject arising out of the fact that we have no ecclesiastical court, and therefore a legatee of personalty, if the executor do not assent to the legacy, is driven to pursue his remedy in a court of chancery, as well as a legatee of money arising from the sale of land devised to be so sold by the executor.

Now the question is, when the legislature provided by the act of 1813 that executors should give bond, was it meant that they should give bond as the executors of the personalty, which constitutes legal assets only, or for that and the performance of the trust in relation to the laws created by the will also? We think there can be but little difficulty in saying that it is confined exclusively to the former.

The statute says, "All executors"—the word executors is a technical term, and applies to duties to be performed in relation to the goods and chattels, rights and credits of the testator, in contradistinction to that of trustee, which applies to duties to be performed in relation to real estate—"shall enter into bond and security in the same way that administrators are required to do." We have seen in what way administrators were required by the act of 1715 to enter into bond and security, and that it is the same that is required by the act of 22nd and 23rd of Charles the Second; that is, a bond for the performance of duties in relation to personal property alone, "unless the testator shall otherwise direct; in which case no bond or security shall be required, unless upon a suggestion that the executor is wasting or likely to waste the estate." Waste, or a *devastavit* as it is called, is a common law term, applicable only to legal assets, and therefore induces the belief that legal assets only were in the contemplation of the legislature. "And in case said executor or executors shall fail to enter into bond, with satisfactory security, said court shall proceed to appoint an administrator for said estate, who shall forthwith call said executor to account for said estate." How is it possible for the administrator thus appointed to call the executor to account for acts done by him in relation thereto, not as executor, but as a trustee and in

[*Hughlett vs. Hughlett et als.*]

will? How is it possible for an administrator thus appointed, to execute the trust, which is of a personal and confidential character, unless he be authorized by express enactment so to do? It must of necessity be, that the only things for which the executor can be called upon thus to account is in relation to the personalty. "And the administrator thus appointed shall give bond and security, and be qualified as other administrators;" not as executors, if executors be required by the statute to give bond for the performance of the trust imposed upon them by the will, but as other administrators, for the personalty only.

We then have the strange anomaly of an executor being removed because he has not given security for the performance of the trust, and an administrator appointed to execute it, who has likewise given no security—an absurdity too glaring to be entertained for a moment.

We therefore hold, that an executor in the State of Tennessee is only bound to give security as administrators are, for the faithful performance of his duty in administering the legal effects of his testator's estate; that the county court has no more power to exact from him a bond for the discharge of his duties as a trustee in selling and disposing of lands under the will, than the ecclesiastical court in England had, and that any bond taken for that purpose is to all intents and purposes null and void. It follows, that if the sureties of the executors in the case now under consideration have, by the terms of their bond, (which we do not so consider,) made themselves responsible for the execution of the trust of the will in relation to the real estate devised to be sold, it has created no legal obligation upon them and they are not bound by it, but are discharged therefrom both in law and equity.

It follows also, as a corollary, that there is no mutual liability created by the bond, as between executors in relation to the trust. But it is contended on behalf of those interested in the execution of the trust, that from its nature and the extent to which it has been partly executed, the executors are mutually responsible for its completion; or, in other words, that inasmuch

[*Hughlett vs. Hughlett et als.*]

as the executors have joined in the sale of the real estate devised to them to be sold under the trust in the will, they are mutually bound to see that the money, when collected, shall be paid to those entitled to it under the will, and of this opinion is the court.

The question came up for consideration in the case of *Deaderick et als. vs. Cantrell et als.* 10 Yerg. 264. That was a case of lands devised to be sold by his executor, and the proceeds bequeathed to different persons, payable as they should arrive respectively at the age of twenty-one years, and directing the executors in the meantime to loan out the money to the best advantage. The lands were sold, and the money collected by one of the executors, and he, instead of loaning it out as directed, appropriated it to his own use. Upon a bill to charge his co-executor for the breach of trust, this court, among other things applicable to the case, but not to this, said: "It is admitted in the case under consideration, that the money was not jointly received, and that no joint receipt was executed: but it is contended, that the money was paid to Cantrell the executor, who consumed the fund, by the act, direction or agreement of Wharton his co-executor, and under such circumstances as must make him liable for its waste; and, we think, successfully.

This is not like ordinary case of a fund outstanding, which has to be received by trustees; but is a case in which property was devised to them to be sold, the notes for which were taken payable to both trustees. Upon the payment of the money, no receipts were necessary; the notes were taken up by the makers, and being in the name of both, it seems to us to constitute as strong, if not a stronger case, than that of a joint receipt.

We do not hesitate to say, that the notes could not have come exclusively into the hands of Cantrell, and the money been collected on them by him without the act, direction and agreement of Wharton;" and the court, upon that ground as well as others, held Wharton responsible for the maladministration of his co-executor Cantrell.

So in the case now under consideration, the lands were de-

[Hughlett vs. Hughlett et al.]

vised to be sold by the executors upon the best advantage; no terms of sale are specified, no time fixed at which the trust is to be completed by the payment of the money to those entitled to receive it; but these matters are left entirely to the discretion of the executors. They proved the will, undertook the execution of the trust, sold the land—this they were compelled by law to do jointly, and it follows, of course, if money were received in payment, it must have been received jointly; if notes, they must have been executed to them jointly, and the payment could not have been received by one individually, without the act, direction and agreement of the other. In either case, an abuse of the trust by one, makes the other responsible to the *cestui que trust*, upon the principles as laid down in the case of *Deaderick and others* against *Cantrell and others*.

Upon the whole view of this case, then, we hold that the executors are jointly responsible for the performance of the trust, and for any abuses that may have arisen in the progress of its execution; that they are jointly responsible by the bond for any maladministration of the personal estate of their testator in the payment of legacies under the will, or in making distribution of any portion of it that may not have been specifically bequeathed, and that the securities in the bond are responsible for them thus far and no farther; and we decree accordingly.

GRAHAM et al. vs. BRADLEY.

1. A guaranty in these words: "I guaranty the payment of the within note at the insolvency of the drawers," is a guaranty of the solvency of the drawers, and binds the holder to use reasonable diligence in the collection of the money.
2. What facts constitute reasonable diligence is a question of law to be decided by the court.
3. Where two months and a half elapsed between the time the note fell due and the commencement of court and no suit was instituted at such term, it was held that due diligence was not used by the holder, and guarantor was discharged.
4. Where justice has been done in the trial below, and the court see from the record of the suit that a second trial would inevitably end in the same result, the court will not grant a new trial, though the circuit judge may have improperly assumed the existence of facts in his charge to the jury.

This action of assumpsit was tried by Judge Maney and a jury of Williamson county, on the plea of non-assumpsit, at the March term, 1844, and resulted in a verdict and judgment for the defendant; from which the plaintiff appealed.

D. Campbell, for plaintiffs.

He cited 20 Johnson, 365; 3 Hum. 72; 19 John. 69; 1 Wen. 467; 15 Wend. 502; 4 Hum. 303; 11 Wend. 629; 4 Cow. 173; 17 Wend. 103.

J. Marshall, for the defendant.

GREEN, J. delivered the opinion of the court.

A bill single was executed by Edwin A. Reaves and Thomas Stewart, to Henry Bridges, in the following words:

"\$300. On or before the 25th day of December next, we or either of us promise to pay to Henry Bridges, or order, three hundred dollars, for value received, as witness our hands and seals, this 29th of July, 1841. EDWIN A. REAVES. [Seal.] THOS. STUART. [Seal.]"

Upon this note are the following assignments: "I assign the within note to Thomas H. Bradley, and guaranty the same without notice or demand as the law requires. July 29, '41. H. BRIDGES." "I assign the within note to R. & S. Graham,

[Graham et al. vs. Bradley.]

and guaranty the payment at the insolvency of the drawer. Oct. 9, '41. T. H. BRADLEY."

The plaintiffs proved that they issued writs against Stuart and Reaves, the drawers of the bill single, the 4th of July, 1842, returnable to the July term, 1842. Said writ was returned executed on Stuart and not found as to Reaves. A *nolle prosequi* as to Reaves was entered, and at the November term of the court a judgment was obtained against Stuart, and an execution was issued during the term, upon a special order, and the sum of \$61 00 was all the money the sheriff could make by virtue thereof.

On the 31st of December, 1842, Reaves paid \$190 50, and of the sum of \$61, made on the execution against Stuart, the plaintiffs received \$49 11 cents. The note thus reduced was put in the hands of a constable in the spring of 1843, and on the 13th day of May, 1843, a judgment was obtained before a Justice of the Peace, against Reaves, for \$80 77 cents, the balance due thereon, upon which judgment an execution was issued, and was returned "no property found."

If a judgment had been obtained against Stuart at the July term, 1842, of the court, the money could have been made out of his property. Reaves was also solvent in the fall of 1842, and continued solvent until January, 1843. The court charged the jury, "that the legal effect of the endorsement relied on by the plaintiffs was to impose on them a resort in the first instance to the makers of the note; that it was incumbent on the plaintiffs to show that they had instituted suit against the makers, returnable to the first term after the note fell due; that they prosecuted said suit to judgment, and that the writ of *feri facias* issuing upon such judgment had been returned *nulla bona*, before they could be entitled to recover against the defendant."

The jury found for the defendant. The plaintiffs moved for a new trial, which was overruled, and they appealed to this court.

It is insisted by the counsel for the plaintiff in error, with much earnestness and ingenuity of reasoning, that the guaranty

[Graham et al. vs. Bradley.]

in this case is an absolute undertaking to pay the money called for in the note, whenever it may be made to appear that the makers were insolvent. The guaranty is in these words: "I assign the within note to R. & S. Graham, and guaranty the payment at the insolvency of the drawers." Now, according to the argument, if the holders of the note had chosen to delay ten years any proceedings against the drawers, to establish their insolvency, the guarantor would be bound to pay the money whenever that insolvency might happen. This would place him in a much worse condition than if it were a guaranty of payment when due. For, according to the argument, the holders might have stipulated for delay with the drawers, and the guarantor would be without remedy: he had bound himself at all events to pay the money when the makers should become insolvent; for five or ten years he could avail himself of no defence, arising from a stipulation for delay in the intermediate time. This could not have been the meaning of the parties. The defendant guarantees the payment at the insolvency of the drawers. This language is awkwardly employed; but it means, that he guarantees the solvency of the drawers. If this is not the meaning, why introduce the word insolvency at all? He thereby postpones the fulfilment of his own engagement in such a way that, if the argument is sound, he could not, under the statute, hasten the collection by giving notice to the holders to sue the makers. The evident meaning, in making the engagement of the guarantors to depend upon the insolvency of the makers was, that he would pay if the money could not be collected from the drawers. This would amount to a guaranty of their solvency, and would bind the holders to reasonable diligence in the collection of the note.

2nd. But it is said, if this be the correct construction of the guaranty, his honor the Circuit Judge erred in telling the jury "that it was incumbent upon the plaintiffs to show that they had instituted suit against the obligors, returnable to the first term after the note fell due." The bond fell due 25th December, 1841: the first term of the court was in March, and suit was not instituted until the 4th of July, 1842.

[Graham et al. vs. Bradley.]

Manifestly the holders did not use reasonable diligence. There were two months and a half from the time the note fell due, until the first term of the court. Reasonable diligence in the collection of the note would have induced the commencement of the suit returnable to March term. What is reasonable diligence is a question of law for the court to decide. His honor should have said, "If the jury find the fact to be, that the note was due the 25th December, and that the first term of the court was in March, the plaintiffs were bound, in the reasonable exercise of diligence, to have commenced their suit returnable to the first term." This would have been in more exact conformity with our theory of the duty of the Judge and of the jury.

But as we see that these facts were thus plainly shown by record of the suit, and could not have been found by the jury otherwise, and as another trial would necessarily result in a similar verdict, the justice of the law having been attained, we do not think we ought to reverse the judgment merely because the Judge assumes the existence of these facts, which, strictly, he should have left to the jury to find, there being no error in the statement of the law.

Affirm the judgment.

GOOKIN et als. vs. GRAHAM et als.

1. In the sale of real estate without warranty of title, the vendee only acquires such title as the vendor possesses, and subsequently acquired title does not inure to the benefit of the vendee: *secus*, where there is a warranty.
2. In a sale of personal property there is always an implied warranty of title, unless the purchase is made under such circumstances as clearly show that the vendee intended to risk the title.
3. The statutes of probate and registration in Alabama are designed to protect purchasers and creditors in Alabama; not in other States.
4. Where a purchase is made under circumstances which should put the vendee on his guard as to title, he is not an innocent purchaser.

James Campbell, for complainants.

Foster, D. Campbell and Alexander, for defendants.

TURLEY, J. delivered the opinion of the court.

The question presented for the consideration of the court, in this case, arises out of a conflict of title to a negro girl slave, Betsy, between James Irwin and John B. Boggs, partners in trade, under the style of Irwin & Boggs, Allen T. Scruggs, George M. Savage, and R. D. Ray, partners in trade, under the style of Scruggs, Savage & Co. and Tate and Arnette, all of the county of Lauderdale, state of Alabama, and Joseph Campbell, of the county of Williamson, state of Tennessee.

The facts of the case are as follows: One Hugh N. Graham, a resident citizen of the county of Lauderdale, state of Alabama, being indebted to Tate & Arnette by note due at three months, in the sum of \$575 06, for goods purchased from them, did, on the 17th day of April, 1837, execute a deed to George N. Arnette, for the negro girl Betsy, in trust, to secure the payment thereof, by which he was authorized and empowered, upon defalcation of payment, and from instructions from Tate and Arnette to take possession of said negro girl, and, on giving ten days' notice of the time and place, to expose the same to public sale for cash, to be appropriated to the payment of said debt of \$575 06. This deed of trust was duly proved according to the forms required by the laws of Alabama, before the

[Gookin et al. vs. Graham et al.]

Clerk of the County Court of Lauderdale, on the 20th day of April, 1837.

On the 15th day of June, 1837, the said Hugh N. Graham made and executed another deed for the same negro to Charles Gookin, in trust, to secure the payment of \$1509 76, due the 1st of January ensuing, to Irwin & Boggs, and of \$225, due 2nd day of January preceding, to Scruggs, Savage & Co. by which said Charles Gookin, as trustee, was authorized and empowered, on the 1st day of January ensuing the date of the deed of trust, if said debts or any part thereof should remain unpaid, to take possession of said negro, and, upon giving ten days' notice of time and place, expose the same to public sale, for cash, to be appropriated to the payment of said debts. This deed of trust was informally proved before the Clerk of the County Court of Lauderdale, on the 7th day of July, 1837, and duly recorded on the 10th of July, 1837.

Between the 17th and 21st day of July, 1837, as appears from the testimony of Robert Pickett and Johnson Trousdale, George N. Arnette, the trustee in the deed executed on the 17th day of April, 1837, to secure the debt due to Tate & Arnette, by the instructions of Tate & Arnette, and in pursuance of the powers vested in him by the deed, took into his possession the negro girl Betsy, and placed her for safe keeping with Johnson Trousdale until the Monday following, at which time Graham was to go to Florence and pay the debt due to Tate & Arnette; but instead of doing this, he did, on the Sunday evening previous, clandestinely take said negro from the possession of Trousdale, and run her to the state of Tennessee, where he sold her to one Joseph Campbell on the 27th day of July, 1837.

The question now is, who is entitled to this negro? Joseph Campbell, under his purchase from Graham in Tennessee, on 27th July, 1837, or Tate & Arnette under the deed of trust executed on the 17th day of April, 1837, or Irwin & Boggs and Scruggs, Savage & Co. under the deed of trust executed on the 15th day of June, 1837?

Joseph Campbell claims to be protected as an innocent purchaser of the legal title from Graham, without notice of the

[Gookin et al., vs. Graham et al.]

trusts created by the deeds of the 17th of April and the 15th of June, 1837.

This claim cannot be allowed for two reasons.

1st. He is not an innocent purchaser: the circumstances under which the purchase was made were of a character to have put him upon enquiry as to Graham's title; and his own conduct in relation thereto afterwards, shows that he did not buy in consequence of any confidence as to the title arising out of the actual possession of the negro by Graham. Graham was to him a stranger; he came suddenly to the town of Franklin, where Campbell resided, from whence no one knew, and departed as suddenly for some point equally unknown. It is a man's own fault, if he will buy from such a person, and under such circumstances: and if it turns out that his vendor has acquired the possession of the property surreptitiously, and has no title thereto, he must abide the consequences. But in addition thereto, when persons who were in pursuit of Graham from Alabama arrived in Franklin, Campbell concealed the negro from them, and denied having purchased her from Graham; two facts totally inconsistent with his claim to protection as a *bona fide* purchaser without notice.

2nd. But if he were an innocent purchaser, having full confidence in Graham's title, and there were nothing which should have put him upon his guard and have caused him to make proper enquiry as to he right, still he could not protect himself as purchaser without notice. Graham was a citizen of the state of Alabama; the negro was there; he had by virtue of the deeds of trust of the 17th of April and the 15th of June, 1837, divested himself of all legal title thereto; he had delivered the possession to the trustee in pursuance of the deed of the 17th of April; he had falsely and fraudently, if not feloniously, regained that possession, and privately and clandestinely run the negro into Tennessee, between the 21st and 26th of July, when she was sold to Campbell. To hold that any title was acquired by this sale, would be to hold that every purchase of a stolen negro from a thief would vest a title in the purchaser unless he knew of the theft. The maxim of *careat emptor* applies with full force to this part of the case.

[Gookin et al. vs. Graham et al.]

We are therefore of the opinion, that the defendant Campbell acquired no right as against the complainants by his purchase.

Tate & Arnette, as we have seen, claim title to the negro in dispute by the deed of trust executed on 17th April, 1837, which was duly proved on the 20th and recorded on the 21st April, 1837, in the county of Lauderdale, state of Alabama, and an actual possession under it taken by the trustee between the 19th and 21st of July, 1837.

This constituted a good legal title in the trustee, subject to the trust created for the benefit of Tate and Arnette, which is entitled to the protection of this court, unless the same is assailable upon an objection taken thereto by those claiming under the deed of trust of the 15th of June, 1837. It is contended for them, that Graham, on the 17th day of April, 1837, the date of the first deed of trust, had no legal title to the negro, but acquired it subsequently, by a bill of sale from H. P. Crittenden, bearing date the 26th of May, 1837; that having no title, none was conveyed by the deed of trust, and that there being no warranty of title in the deed, the subsequently acquired title cannot by estoppel inure to the vendees under the deed. This objection is not sustainable for two reasons.

1st. Though it be true that there is a bill of sale from Crittenden to Graham, purporting to bear date on the 26th May, 1837, and to convey the title to him, yet it does not establish the fact that his title had no existence till that period. On the contrary, there is much in the record to induce the belief, and we do believe, that he was in the possession of the negro, claiming her as his own, at a period anterior, not only to the bill of sale, but to the deed of trust of the 17th of April, 1837.

2nd. The principle contended for is not applicable to sales of personal property. In the sale of real estate, if there be no warranty of title, the vendee only acquires such as the vendor had at the time of the sale, and any subsequently acquired does not inure to his benefit. But it is otherwise, if there be a warranty, for inasmuch as the warrantor was anciently, upon *warrantia chartæ*, bound to recoup in lands of equal value, and in modern times in money upon a covenant of warranty, a subsequently acquired title shall inure by estoppel, to avoid

[Gookin et al., vs. Graham et al.]

circuitry of action. In a sale of personal property there is always an implied warranty of title, unless it be purchased under such circumstances as clearly show that the vendee intended to risk the title; as if the vendor be not in the possession, but the same be adversely in another. In the present instance, there is nothing to prevent the implication of a warranty of title on the part of the defendant Graham, to the negro conveyed by the deed of the 17th of April, 1837; and by legal analogy, any title which might have been acquired by him from Crittenden under the bill of sale of the 26th of May, 1837, would immediately inure to the benefit of those holding under the deed of trust.

We therefore think, that George R. Arnette, the trustee in the deed of trust of the 17th of April, 1830, is vested with the legal title to the negro in dispute, subject to the trust in favor of Tate & Arnette, and as such entitled to the protection of this court.

With this view of the case, it is not important to enquire very minutely into the validity of the right of those claiming under the second deed of trust, executed to Charles Gookin as trustee on the 15th day of June. It has been attacked upon the ground that it was not admitted to registration in the county of Lauderdale, state of Alabama, so as to make it effectual against creditors and subsequent purchasers for want of a legal probate. This is probably so; but inasmuch as we hold that it could not prevail against the deed of the 17th of April, 1837, though it had been proved and registered with all the formalities required by the statute laws of Alabama, we do not deem it necessary or proper to determine the question authoritatively.

The execution of the deed of trust to Gookin is proved in this case by the subscribing witnesses, and is good as against defendant Campbell without registration, because (as we have held) he is not an innocent purchaser; and if he were, he is not such subsequent purchaser as was intended to be protected by the statutes of probate and registration of Alabama. Those statutes are designed to protect creditors and subsequent purchasers in the state of Alabama, and not in the state of Tennessee. The deed of trust was good as against the parties without

[*Baker vs. Jordan.*]

registration in Alabama: the negro was not removed to the state of Tennessee by the consent of Gookin the trustee, or any of the *cestuis que trust*, but by the deceitful and fraudulent misconduct of Graham, and immediately sold to Campbell; and therefore the want of registration of the deed of trust in Tennessee can avail him nothing. *Galt vs. Dibrell*, 10 Yer. R. 146.

The consequence of this is, that Gookin as trustee is entitled in preference to Campbell to any surplus, if any, of the proceeds of the sale of said negro, which may remain after satisfying the demands of Tate & Arnette, secured by the deed of the 17th of April, to be by him appropriated in satisfaction of the demands secured by that of the 15th of June.

BAKER vs. JORDAN.

1. In covenant where defendant pleads covenants performed, the plaintiff must prove the amount of damages, and can only recover the amount proved.
2. Where in covenant there was a plea of covenants performed, and no proof was introduced except a note for dollars payable in current bank notes, it is held that the jury are warranted in giving a verdict for the number of dollars called for in the note.

This case was tried by Judge Maney and a jury of Williamson county, and a verdict and judgment rendered in favor of the plaintiff; from which the defendant appealed.

S. Venable, for plaintiff in error.

Alexander, for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of covenant upon the following instrument:
“\$2821 27. One day after date I promise to pay Williamson Jordan twenty-eight hundred and twenty-one dollars and 27 cents, in current Tennessee bank notes; value received.

[Baker vs. Jordan.]

Witness my hand and seal this 1st of January, 1842. H. G. BAKER. [Seal.]”

The defendant pleaded covenants performed. On the trial, the plaintiff read this covenant in evidence, and here rested his cause. The jury found for the plaintiff \$3170 24 cents. The defendant moved for a new trial; which motion being overruled, he appealed to this court.

It is now insisted, that the plaintiff, upon this evidence, is entitled to nominal damages only, because he did not prove the value of the Tennessee bank notes at the time the covenant was broken. It is certainly true, that upon the issue in this case the plaintiff must prove the amount of damages, and can only recover the amount so proved. 1 Saunders on Pl. 396, top page.

But here is a covenant to pay so many dollars in current Tennessee bank notes, and this covenant is read to the jury. The words current bank notes mean that which circulates currently as money; and which, in absence of proof to the contrary, is presumed to be of value equal to money. *Primo facie* it is of such value; and if a defendant in such action is not willing it shall be so considered, he may introduce proof to show that it is of less value.

We think the jury were unwarranted by the evidence to find the verdict they rendered.

Affirm the judgment.

TILMAN *et als.* vs. SEARCY *et als.*

Where complainants unite in a bill claims which are distinct and hostile to each other, such bill is demurrable for multifariousness.

Guild and *Burton*, for complainants.

Stokes and *Brien*, for defendants.

REESE, J. delivered the opinion of the court.

The bill in this case, among other things, alledged, that Tilman and Pool each obtained separate judgments before a Justice of the Peace, against one William P. Searcy, amounting together, with interest, to about the sum of seven hundred dollars; that they caused executions to be issued thereon, which were levied upon a tract of land, mentioned in the pleadings; and being duly returned to the Circuit Court, process of *venditioni exponas* in each case was duly awarded and issued, and that afterwards the tract of land was exposed to sale and sold thereon, the said Tilman by the consent of the said Pool bidding the full amount of both executions, and became the purchaser, at the price of about seven hundred dollars; that said Tilman has taken a sheriff's deed for the said land, which is duly registered. But they alledge that before their said levy, the defendant William P. Searcy by a fraudulent deed of trust conveyed the lands to the other defendants to secure pretended debts, and that shortly thereafter, and a little before the levy of the executions, the said William P. made an absolute deed to his father, the defendant Reuben Searcy; which deed, as well as the deed of trust, is fraudulent and void as against creditors, being made with the intent to hinder and delay the collection of just debts; and that said conveyances constitute a cloud over the title of the said Tilman, which they therefore pray may be set aside and declared void. The other complainants severally alledge that they have obtained judgments against the said William P. Searcy; that subsequently to the sale of the land by virtue of the *renditioni exponas* of Tilman and Pool, they caused

[Tilman et als, vs. Searcy et als.]

the same land to be levied on by the *venditioni exponas*, and that the same will be sold thereon before the cause will be brought to a hearing. They pray that the fraudulent titles of the defendants may be declared void, and that the land may be sold by the decree of the court, and the parties complainants may be paid their judgments, either *pro rata* or according to their priorities. The defendants demurred to the bill, for misjoinder of complainants and for multifariousness: and the first question in the case is, shall this demurrer be allowed? and we are of opinion it must be. Parties complainants to a bill must in general have a community, not indeed in every instance an identity, of interest. Story, in his Equity Pleading, 509, says, "The want of interest is not only a good cause of demurrer, in the case of a sole plaintiff, but if the suit is joint, a want of interest in either of the plaintiffs is equally fatal." In this case Pool is not a judgment creditor. The bill shows his judgment to have been extinguished. He is not a purchaser, for Tilman is purchaser, and has the sheriff's deed. This is not a creditor's bill, for Tilman is a purchaser, has the legal title, and by his purchase satisfied the judgment. The other complainants are judgment creditors, whose attitude and interests create a conflict, not with the defendants merely, but necessarily with their co-complainants.

This court, with some hesitation and difficulty, maintained the bill of *Henderson & McDermot vs. Peck et als.* 3 Hump. 247, for the reasons there stated. To sustain this bill would be to go greatly further, and would lead to much inconvenience and confusion by the joinder of complainants with distinct, inconsistent and hostile claims and grounds of relief in the same bill.

For these reasons, we reverse the decree of the Chancellor disallowing the demurrer, and allow the same; and of course we dismiss the bill, without deeming it necessary, or perhaps proper, to enquire into any other questions raised in the record.

NORVELL, for the use of Gordon, vs. JOHNSON et als.

The assignee of a note, given by the vendee of real estate, has a right to enforce the vendor's lien; but this right is not extended to the holder of a collateral security for the payment of such note.

James Campbell and Foster, for complainant.

Marshall, Fogg and Ewing, for defendants.

REESE, J. delivered the opinion of the court.

In 1825, Andrew Campbell purchased of Searcy D. Sharp a tract of land, for the price of four thousand three hundred and two dollars; and to secure the price, gave to Sharp his three individual notes, each amounting to upwards of \$1,400, and severally due the 1st of May, 1836, and the 1st of January, 1837 and 1838. Sharp gave his title bond to convey the land when the consideration should be paid. Campbell paid and took up the two notes first due, and made a payment upon the third note, which had been assigned by Sharp to B. S. Tappan & Co. Sharp made a deed to Campbell for the land, and duly acknowledged it before the Clerk of the County Court of Williamson, where the land lies, and enclosing it in an envelope, upon which he endorsed, that the deed was to be given up to Campbell upon the order of Tappan & Co. he deposited it in the vault of the bank.

In May, 1839, E. T. Collins, a member of the firm of Andrew Campbell & Co., drew a draft or bill of exchange in the name of Andrew Campbell & Co. upon Allen, Ashurst & Co. of New Orleans, for \$1,172, payable to B. S. Tappan & Co., being the balance due for the third note of Campbell to Sharp, for the price of the land. The bill of exchange was drawn at 6 months, and dated La Grange, and is endorsed by B. S. Tappan & Co. and by E. S. Tappan. Whether this bill of exchange was taken by B. S. Tappan & Co. in payment of the note given to Sharp, and assigned by him to B. S. Tappan & Co., and the note itself taken up by Collins, the partner of Campbell, or whether it was taken up as a mode or means of

[Norvell for the use of Gordon vs. Johnson et al.]

payment, does not appear by any direct and express proof in the record.

About the 1st of January following (1839) Campbell, by deed, conveyed the land in question in fee to the defendant Connor, to secure the payment of the debts of certain of his own creditors, with power to sell the same. Connor, the trustee in said deed, did sell the same, and the defendant, John Johnson, became the purchaser of the same at the price of \$4,800, and received a deed therefor. The complainant became the holder of the bill of exchange above referred to, and brought suit thereon against A. Campbell & Co. and B. S. Tappan & Co., the same not having been paid by Allen, Ashurst & Co., and obtained judgment against said A. Campbell & Co., and B. S. Tappan & Co., satisfaction of which he has not been able to procure by executions. The complainant has filed this bill to subject the said land to the satisfaction of his demand, upon the ground, that the bill of exchange, which has come into his hands was a collateral security for the note, and that the note was a part of the consideration for the land.

The right of the complainant to the relief sought by his bill, will depend upon two questions; either of which being determined against him, must reject his claim. The one is a question of fact, the other of law. The question of fact is, was the note paid by the bill of exchange? If not, the question of law is, can the holder of the collateral security be regarded as the assignee of the note, so as to assert and enforce the vendor's lien against the land?

1st. As to the fact, it is contended for the complainant, that when the proof does not show that the new security was taken in payment of the old, the contrary will be intended, and it will be held that the new security was taken only as the means of payment. Let this principle be conceded: we proceed to inquire whether the facts and circumstances in this case are not sufficient to rebut such presumption. In the first place, then, the note is not produced, nor proved to be in existence, the plaintiff having prayed in his bill that it might be produced, and having alledged that it was among the papers of B. S. Tappan & Co. Campbell, indeed, as a witness, says it is not

[Norvell for the use of Gordon vs. Johnson et al.]

in his possession; that he does not know whether the bill of exchange was taken as payment or as means of payment; that his partner, Collins, and not he, attended to the matter, and that he does not know whether Collins took up the note or not. It must be remembered that Campbell was individually liable on the note, and that his partner in his absence attended to this matter, and signed the bill of exchange in the firm name. Is it not extremely improbable that a partner, acting in the absence of his co-partner, would give a security in the name of the firm, binding himself for the individual note of his co-partner, and would not at the time take up such individual note of his partner, but leave it, as well as the bill of exchange, in the hands of the creditor? Again: The entry upon the books of Tappan & Co. by B. S. Tappan himself, and in the presence of Collins, as proved by Crouch, makes the impression that the parties understood the transaction as a payment of the note.

These facts make it probable, and induce us to believe, that the note was in fact paid and taken up by the bill of exchange. but if this were otherwise, can the holder of a collateral security be regarded as the assignee of the note itself, to which the security is collateral, and thus enforce the vendor's lien upon the note against the land? This court in the case of *Graham vs. McCampbell*, Meigs' Rep., determined that where the title is reserved by the vendor, or where he takes a mortgage to secure the payment of the consideration, the assignee of the vendor's note for the consideration, has a right in equity to subject the land for the payment of the same; but this case seeks to go further, and to invest the holder of a collateral security with the same right.

This we think cannot be done. No authority upon the point has been produced. The parties to such collateral security, do not, in point of fact, negotiate upon the credit of the vendor's lien. Many such collateral securities might not have upon them the name of the vendor at all, and might spring out of distinct and independent transactions. There might be several collateral securities of different sorts, given to meet the payment of the vendor's note, and these, again, in the course of their nego-

[Bond et als. vs. Ray et als.]

tiations, might have their own several collaterals, and so on in an almost endless series.

To hold that the fact of the security being collateral, primarily or secondarily, or more remotely, to the vendor's note for the price of the land, constitutes an equitable priority, authorizing any of said parties, upon the ground of it, to resort to the vendor's lien upon the land, would introduce much confusion and great practical inconvenience.

We are not aware of any authority for so holding, and upon grounds of public policy, we should regret if any general principle or just analogy compelled us so to hold.

But we think there is none such. We, therefore, reverse the decree, and dismiss the bill, and the complainant and defendant, Johnson, shall each pay half of the costs.

BOND *et als.* vs. RAY *et als.*

1. The beneficiary in a guardian bond gave an order to a third person on the guardian, which was accepted. This did not discharge the sureties. It did not affect the nature of the debt. It only directed the payment to another person.
2. Any act by the principal, injurious to the rights of the sureties, any failure to do acts required of him by law, discharges the sureties.
3. Where the beneficiary in the bond, left an accepted order in the hands of the guardian, which he exhibited to the sureties, and informed them that his bond was discharged, such conduct did not discharge the sureties, unless the beneficiary participated in the fraud of the guardian.
4. Where the beneficiary in a guardian bond, told the sureties they were discharged: It is held, that such declaration discharged them, as it may have prevented them from taking an indemnity.

This is a bill which was filed in the Chancery Court at Franklin, by Bond and others, praying an account of the guardianship of Ray, and a decree against him and his sureties.

The case was heard on bill, answers, replications and proof, at the November term, 1843, by Chancellor Bramlitt, and a de-

[Bond et als. vs. Ray et als.]

cree rendered in favor of the complainants, from which the defendant appealed.

J. Marshall, for the complainants.

Alexander and D. Campbell, for the defendants.

GREEN, J. delivered the opinion of the court.

The facts of this case are shortly as follows. The defendant, Ray, was guardian of Nancy Garrett, one of the complainants, now wife of the complainant, Bond. The defendants, Hamilton and Hill, were Ray's sureties in the guardian bond. Upon a settlement with the County Court, Ray was indebted to his ward \$614 92. In 1841, Bond gave an order to Thomas Hughes on Ray for \$33 75, which was accepted by Ray. On the 1st day of January, 1842, he gave William McKenzie an order on Ray for \$446 37, the balance Ray then owed. This order was also accepted. Some payments have been made upon this order, and it has been transferred to the complainant, Southall. Bond and wife, Hughes and Southall, are all parties complainants in the bill.

A recovery is resisted by Hamilton and Hill, the sureties, on the ground:

1st. That by drawing these orders in favor of Hughes and McKenzie, and their acceptance by Ray, he was discharged from all further liability as guardian, and became bound as a private debtor only, and that Bond thereby discharged the sureties from all liability. We think there is no foundation for this position. The orders do not purport to change the debt, nor can they have that effect. They are no more than a direction to pay the fund to other persons. They are no new security given by Ray, operating a discharge of the debt. By their terms the debtor was to be discharged upon the payment of the orders. It is not like the case where a new note is taken, or where the creditor takes an order on a third person from the principal debtor. In such cases a new debt is created, on the individual responsibility of the debtor, and the sureties in the

[Bond et al. vs. Ray et al.]

old obligation are discharged. But an order to pay another, does not change the nature of the debt, or affect its validity until the order is paid. The transfer of this debt by the order to McKenzie, can have no other effect than the transfer of a note by assignment, would have.

2d. It is next insisted, that the complainant, Bond, was guilty of unfairness towards these sureties, and enabled the defendant, Ray, to deceive them with assurances, that he had paid the debt. It appears that when the order to McKenzie was drawn and accepted, all the parties, Bond, Ray and McKenzie, were together, and that two or more orders were drawn and signed, and that for some cause, not satisfactorily explained, one of these orders was left on the table and fell into the hands of Ray. Ray says in his deposition, that Bond left it in his hands to show Bond's creditors, who might desire to garnishee him, that the debt was transferred. Bond alleges that he was not satisfied with the manner in which it was accepted, and drew another order, which was accepted as he wished, and that the first one was inadvertently left on the table, and thus fell into the possession of Ray. Ray told his sureties that he had settled with Bond, and had a full receipt, but he did not show the order he had kept in his hands, purporting to be drawn by Bond in favor of McKenzie. It is insisted that there is a want of good faith towards these sureties on the part of Bond, manifested in the transaction relative to this order—that he enabled Ray to deceive them, so that they were lulled into security and failed to obtain the indemnity they otherwise might have had. It is certainly true, that a creditor must in all transactions with the principal debtor, act with the most perfect good faith towards sureties, for if he does any act injurious to them, or inconsistent with their rights, or omits to do any act which his duty to them requires him to perform, whereby they are injured, they will be discharged from responsibility. Story's Eq. sec. 325-26: *Thompson vs. Watson & Gibson*, 10 Yerg. R. 362.

But the question recurs. What act has Bond done inconsistent with the rights of these sureties? Ray says, that Bond left the duplicate of his order in favor of McKenzie in his (Ray's) hands, that the creditors of Bond might be satisfied Ray owed

[Bond et al. vs. Ray et al.]

him nothing, and might be deterred from summoning him as a garnishee. This he had a right to do. If he owed McKenzie (which is not controverted) he had a right to apply the money in Ray's hands to the payment of that debt in preference to others, and having so applied it, there was nothing wrong in wishing his other creditors to know how the fact was, so that he might avoid useless litigation. Having placed this duplicate order, therefore, in the hands of Ray for a lawful purpose, he is surely not answerable for any wicked and unlawful use which Ray may have made of it. Had Ray, therefore, instead of showing the order to Bond's creditors—the object intended—shown it to his sureties, by which they were deceived into the belief that the money had been paid and the order taken up, still we cannot perceive upon what ground Bond could be chargeable with the deception. But Ray did not show them the order; he only told them he had settled with Bond and had a receipt in full. This he knew was false, and the sureties were deceived by him, but surely a creditor is not responsible for the false representations of his debtor to the sureties. It is not like the case of *Harris vs. Brooks*, 21 Pick. R. 195, where the holder of a note told the surety that he would look to the principal and not to him for payment. Nor is it like the case of *Baker vs. Briggs*, 8 Pick. R. 122, where the creditor informed the surety the debt of the principal was paid. In each of these cases the surety was deceived by the representations of the creditor. But here the creditor made no representations to the sureties himself, nor did he have any agency in the falsehoods the principal debtor told them.

It is said Bond told one of his creditors that Ray owed him nothing. This in that connection was true. The debt had been transferred to another, and in connection with the object of Bond's conversation with his creditor, Ray had ceased to owe him. But there is no proof that these sureties knew anything of this statement of Bond; they could not, therefore, be deceived by it.

Upon the whole we think there is no error in the record, and affirm the decree.

CHARLTON vs. LAY.

1. A warranty of title is implied in the sale of a chattel.*
2. Where the defendant received an execution in payment for a horse by him sold: It is held, that in a suit brought against him for the consideration received, he could not urge that the execution received by him had been discharged by a previous levy, he having collected the money thereupon.
3. If a deed of trust, containing articles consumable in the use, stipulate that the vendor may use them, such deed is fraudulent and void.
4. When a deed of trust contained articles consumable in the use, but no stipulation that vendor might use or consume them, and the vendor, with the assent of the beneficiary, consumes them, such fact is an indication of fraud proper for the consideration of the jury in connexion with the evidence in the case.
5. An action for money had and received does not lie to recover back money paid on a contract, unless there be a total failure of consideration. It does lie where the vendor of personal property had no title to the property sold. In such a case there is a total failure of consideration.

This is an action for money had and received, which was brought by Lay against Charlton, in the Circuit Court of Davidson county. The defendant pleaded non-assumpsit, and the issue thereupon was submitted to a jury at the January term, 1844, Judge Maney presiding.

It appeared that Charlton sold Lay a horse, and in payment for the horse transferred an execution on a third person to Charlton. The execution had been levied on property, which levy had been, by consent of Lay and defendant therein, discharged. Charlton collected the money on it.

Lay after having kept and used the horse for some time, ascertained that Cooley, who had sold him to Charlton, had conveyed him in trust, before the sale to Charlton, to one Estis, for the securing a debt due to Robert White. He, therefore, believing the deed to have been made in good faith, surrendered the horse and instituted this action against Charlton to recover the money he had collected on the execution.

A verdict and judgment were rendered in his favor, and the defendant, Charlton, appealed.

Charlton, for plaintiff in error.

Goodlett, for defendant in error.

[Charlton vs. Lay.]

GREEN, J. delivered the opinion of the court.

From the bill of exceptions in this case, it appears that Lay purchased a horse from Charlton, and paid him therefor; but shortly afterwards ascertained that the horse had belonged to one Cooly, who had conveyed him by deed of trust to Estis, for the security of a debt to Robert White; and that after the horse was so conveyed by Cooly, he sold him to Charlton, who sold him to Lay. Lay became satisfied that he had no title to the horse, and gave him up to the trustee in said deed, and brought this action for money had and received, to recover back the price he had paid Charlton. A verdict and judgment were rendered in the court below, and Charlton appealed to this court.

1st. It is insisted, that as Lay transferred an execution on another person to Charlton, in payment for the horse, which execution had been previously levied on property of value sufficient to satisfy it, Charlton received no consideration from Lay, and, therefore, nothing can be recovered in this action.

To this it may be answered, that Charlton actually collected the money on the execution transferred to him by Lay, without any objection having been made by the defendant in that execution, and he cannot now object, that the collection of the money by him, might have been successfully resisted. The defendant in the execution, alone could have insisted on the virtual satisfaction by reason of a previous levy. But it appears by the endorsement on the execution, that the levy was released by the plaintiff, and the property which had been levied on, remained in the possession of the defendant in the execution, so that he could not have set up the defence, that the said levy was a satisfaction.

2d. It is next insisted, that Charlton had a good title to the horse, because the deed of trust was fraudulent and void. The deed of trust, after enumerating several articles of property, adds, "and all other personal property, of which I am possessed, which is properly the subject of a deed of trust." It is in proof, that Cooly had some corn and fodder. This it is insisted, was included in the deed of trust, by virtue of this general

[Charlton vs. Lay.]

clause, and being consumable in the use, it makes the deed void by the statute of frauds.

It is true, if a deed of trust contain articles consumable in the use, and there be a provision, that the party making the deed shall remain in possession of and use said articles, the deed would on its face contain a reservation for the benefit of the grantor, calculated to hinder and delay creditors, and would, therefore, be fraudulent and void. But this deed contains no such stipulation, and, therefore, it is not void, for anything contained in the deed. Whether the parties so treated the property conveyed, as to furnish evidence that the deed was fraudulent in fact, was a question for the jury to decide from the evidence, and we think they have decided correctly, that the deed was *bona fide* and valid.

3d. It is insisted, that there is no implied warranty of title in the sale of a chattel. This court has decided at the present term, in the case of *Gookin vs. Graham and others*, and the case of *Trigg vs. Faris*, that there is such implied warranty.

4th. It is insisted, that Lay cannot recover in this action, because there was a part performance of the contract, as he received the possession of the horse, and used him a short time.

It is true, that if a part of the consideration for a contract be received, an action for money had and received, will not lie to recover back the money paid upon such contract. In order to maintain such action, there must be a total failure of consideration. Chitty on Contracts, 488. But here there was a total failure. The horse was delivered it is true, but he belonged to another person, and the purchaser had a right of action the next moment. If he retained possession a few weeks, he retained it for the true owner. The cases to which the principle relied on applies, are such as the following: If A buy of B 100 bushels of corn, and pay the price agreed on, and B delivers ten bushels, and fails to deliver the remaining ninety, here an action for money had and received cannot be maintained to recover back the money paid, because a part of the consideration has been received. In that case, the party must resort to his special action.

There is no error in this record, and we affirm the judgment.

UNION BANK vs. EATON.

1. If money be borrowed by a partner in his own name and on his own credit, and his individual note be given therefor, it is no fraud afterwards to execute the note of the firm in renewal, provided the money goes into the business of the firm.
2. If a partner borrow money for the firm, and on its credit, it is no fraud to substitute the note of the firm for the individual bill of the partner given to secure its payment, though it may not appear that the money was applied to the business of the firm.

This is an action of assumpsit, which was instituted by the Union Bank, in the Circuit Court of Davidson county, against John H. Eaton, as one of the makers of a promissory note.

Eaton pleaded *non est factum*, and an issue thereupon was submitted to the jury, Maney, Judge, presiding, and a verdict and judgment rendered in favor of the defendant, from which the plaintiff appealed.

Washington, for the plaintiff.

A. Ewing, for the defendant.

GREEN, J. delivered the opinion of the court.

This action is brought upon a promissory note, which purports to have been executed by Hall & Eaton.

Hall & Eaton were partners in an extensive distilling establishment in the county of Davidson. Hall drew a bill of exchange on Eaton, which was negotiated at the Union Bank the 19th of April, 1838. This bill was protested for non-acceptance: when it came back it was taken up by Hall, who in subsequent renewals executed notes in the name of Hall & Eaton. The note now sued on, is the one executed on the last renewal. The plaintiff proved by Armstrong, that when Hall presented the bill for endorsement, he said he wished the money to be obtained by discounting the bill, for the use of their distillery.

John M. Bass, President of the Bank, proved that Allen A. Hall, when he offered the bill for discount at the Bank, stated that the proceeds were wanted for the use of the distillery carried on by him and Eaton, which was much in need of funds; that he had authority from Eaton to draw on him to raise funds

[Union Bank vs. Eaton.]

for that purpose; and witness thought that Hall exhibited to him a letter from Eaton to that effect.

The charge of the court need not be set out or criticised, for although somewhat ambiguous, we are not prepared to say that, when properly understood, it is erroneous.

The jury found for the defendant, and the plaintiff moved for a new trial, which was refused, and an appeal was taken to this court.

We think His Honor erred in refusing a new trial. The question before the jury was, whether Hall and the plaintiff had been guilty of a fraud in the substitution of the note of Hall & Eaton, executed by Hall, for the draft which Hall had drawn, and upon which he had received the money from the Bank. As the draft was drawn in Hall's individual name, if the money was advanced for his individual use, and on his credit, the substitution of this note for the draft would be a fraud on Eaton. But the evidence does not make out that case. Armstrong and Bass prove, that Hall said, when he presented it to the Bank for discount, that he wanted the money for the use of the distillery of Hall & Eaton. Now, as they were partners in that business, Hall had a right to borrow money on the credit of the firm, to be used for the prosecution of the transactions of the partnership. Having borrowed the money for the business, and on the credit of the firm, both partners would be liable therefor. But if he secured the payment by note or bill, in his own name, the creditor would have an action on that security against him only, though he may possibly succeed against the firm for money had and received. Collyer on Part. ch. 2 sec. 2, p. 262: Story on Part. sec. 102, 104.

These principles were quoted from Story's and Collyer's works on partnership, in the case of *Foster vs. Eaton*, (4 Hump. Rep. 346,) and approved by this court in the following paragraph:

"It is clear from these authorities," says the court, "that where money is borrowed for a firm, and the individual note or bill of one partner only is taken, that partner alone will be responsible on the note or bill, and in order to hold the firm liable for money advanced, it must appear that it was obtained

[Union Bank vs. Eaton.]

for the firm, and on the credit of the firm, otherwise it will be treated as an election by the creditor to absolve the partnership from responsibility, and to confine the credit to that partner only."

From these principles it follows, we think, that if money be obtained for a firm, and on its credit, by the acting partner thereof, it is no fraud upon the other partner, if the note of the firm be executed therefor, although it was originally secured by the note or bill of the acting partner only. It cannot be said to be the acting partner's private debt in the sense in which it is held to be a fraud, for a partner to pay his private debt by the substitution of the note of his firm.

1. If, therefore, money be borrowed by a partner in his own name, and on his own credit, and his individual note be executed therefor, it is no fraud afterwards to substitute the note of the firm, provided it be shown, that the money actually went into the business of the firm; or

2. If a partner borrow money for the firm, and on its credit, it is no fraud to substitute the note of the firm for the individual bill of the partner, which may have been originally given to secure its payment, though it may not appear that the money was applied to the business of the firm.

With these views, we think, the court erred in refusing a new trial, as there is no opposing testimony, and no question of preponderance of proof.

Reverse the judgment, and remand the cause for another trial.

FARQUHAR vs. TONEY.

1. The assumption of facts by the Circuit Judge as proved, which were proved, and about the truth of which there was no controversy, is not an invasion of the province of the jury, for which the court would reverse the judgment of the Circuit Court.
2. Notice of the sale of real estate, of which the execution debtor is not in possession, need not be given under the act of 1799.

This is an action of ejectment, which was instituted in the Circuit Court of Smith county, by Toney against Farquhar. It was tried on the general issue at the April term of the Circuit Court, in 1844, Judge Caruthers presiding. A verdict and judgment were rendered in favor of the plaintiff, from which the defendant appealed.

McDonald, for plaintiff in error.

Guild, for defendant in error.

GREEN, J. delivered the opinion of the court.

On the 16th of June, 1840, various executions issued by Justices of the Peace were levied on 109 acres of land as the property of Godfrey Gregory. At the succeeding August term, of the Smith Circuit Court, the land so levied on was condemned; orders of sale were issued, and the land was sold, and the purchaser transferring his bid to the lessor of the defendant in error, a deed was made to him by the Sheriff, dated the 8th of December, 1840. On the 17th of June, the said Gregory sold fifty acres of said land to the plaintiff in error, who was in possession thereof, and has continued in possession up to the time this suit was brought. At the date of the levy and sale, Gregory was in possession of a sixty-two acre tract, as some of the witnesses call it, but which in his testimony he calls a fifty-nine acre tract. This tract is a part of the one hundred and nine acres levied on and sold, but was held by Gregory, by a distinct deed. The fifty acres sold to the plaintiff in error, consisted of two tracts conveyed to Gregory by distinct deeds, the one of seven acres, and the other of forty-three acres. All

[Farquhar vs. Toney.]

three tracts, the 62 acres upon which Gregory lived, the 43 and 7 acres upon which the plaintiff in error lived, lay adjoining, constituted what was described in the levy and sale as the 109 acres, and at the date of the levy it was all owned by Gregory, the execution debtor.

The evidence conduces to show, that the twenty days notice, prescribed by the act of 1799, ch. 14, sec. 1, which a Sheriff is required to give to a defendant in execution, who is in possession of land levied on, before the sale thereof, was not given to Gregory in this case. The court told the jury, that the defendant below could not set up that defence. The jury found for the plaintiff, and the defendant appeals to this court.

1. It is insisted that the court erred in assuming the facts, upon which His Honor told the jury the defendant could not set up the defence of the want of twenty days notice to Gregory.

Perhaps, strictly, the duties of the court, as defined by the constitution, should have been performed by stating the evidence, and telling the jury, that if the facts thus stated to be evidence, were proved to their satisfaction, the law would be, that the defendant could not make the defence relied on. But we do not consider this objection of any weight. The departure of the Judge from the strict line of his duty, if there were a departure at all, is very slight, could not have misled the jury, and consisted in the assumption of facts as proved, about which there was no controversy, and which were most plainly proved as he had stated them.

2. It is next urged that the court erred in rejecting the defence in question. If the sale of the fifty acres in controversy were void for the want of the twenty days notice to Gregory, the defendant below might insist on that fact as a defence to the action against her. But the question is, was the sale void?

Gregory had three small tracts adjoining, on one of which he lived, and of which he was alone in possession. If the 43 acre and the 7 acre tracts, of which Gregory was not in possession had been alone sold, it could not be contended with any plausibility, that Gregory would have been entitled to notice. The fact that they lay adjoining the tract of which he had pos-

[Farquhar vs. Toney.]

session, would no more entitle him to notice, than if they were a distance from him.

But it is said the three tracts were levied on and treated in the sale as one tract, and that the purchaser at execution sale, cannot now contradict the officer's return, and prove that there were three tracts and not one only.

To this it may be answered, that the Sheriff returns, that he gave the twenty days notice required by the statute—but the defendant below seeks to prove, that such notice was not in fact given.

May not the plaintiff also prove, that the notice was not required to be given, because the defendant in the executions was not in possession of the land in controversy in this suit? We think he may do so, and that the evidence was properly received.

3. The Constable's levies having been made the 16th of June, created a lien upon the land in favor of the judgment creditors, which is superior to the right of the defendant by virtue of the deed made to her the next day.

Affirm the judgment.

BOOKER et als. vs. BOOKER et als.

1. To constitute a valid executory devise, the contingency upon which it is to take effect must occur within a life or lives in being and twenty-one years and a fraction of a year afterwards. If then it is limited to take effect upon the failure of issue, that failure must be definite, and certain to happen within the period abovementioned; for if the termination be upon an indefinite failure of issue—that is, upon the extinction of the whole line of descendants—it is too remote, as tending to the creation of perpetuities, and is therefore void, and the property vests absolutely in the first taker.
2. The testator provided as follows: "Should any of my children die without issue coming to maturity, or die without issue either before or after coming of age, or should leave issue, which issue should die before coming of age; in either of these events, such portion of my estate so bequeathed to such child or children is to be equally divided between my surviving children." The contingency upon which this limitation is to take effect must happen in the lifetime of some of the testator's children, and it is therefore valid in accordance with the above rule.
3. Where a will gives an absolute power of disposition and a limitation over is made by way of executory devise, such limitation is void, and the estate vests in the first taker.
4. Where real estate was devised to the executor as a compensation for the trouble of executing the trusts of the will, it is held that the devise vested on the qualification of the executor.

This case was heard by Chancellor Cabal, on bill, answer, replication and proof, at the September term, 1844, of the Chancery Court at Columbia, when the following decree was entered.

It appearing to the court, that on the — day of May, 1839, Peter R. Booker departed this life, after having made and executed his last will and testament, with two codicils thereto; that after his death his will and two codicils were duly proved and admitted of record: and it appearing to the court, that, among other provisions of the will of P. R. Booker, deceased, he gave to his son Henry L. Booker his land on Bigby creek, purchased of Long and Macon, also one half of his mill and cottongin on the Degraffenreid place, and \$6000 worth of negro slaves, men to be valued at \$600 and women at \$400, and others in like proportion. It also appearing, that he gave the said Henry L. Booker, on the coming of age of his youngest child, one of the stores and counting rooms with the lot on which it is situated in Columbia. It likewise appearing to the court, that said Peter R. Booker gave his son Henry L. \$2000

[Booker et als. vs. Booker et als.]

of his stock in the Union Bank of Tennessee, in discharge of his indebtedness to said Henry for work done on the Columbia and Franklin Turnpike road, which was by the said Henry L. received on the condition required in the said Peter R. Booker's will. It further appearing to the court, that said Booker, in the codicil to his will, appointed James G. Booker and Henry L. Booker his executors, and for their services as executors of his will gave them two tracts of land of 640 acres each, one situated in Desoto county and the other in Fayette county, Mississippi, on both sides the Tallashatchie. It further appearing to the court, that said Henry L. Booker in his lifetime had caused to be laid off to him, in compliance with the direction of said will of Peter R. Booker, \$6000 worth of negroes, as follows, to wit: Dave, Hampton, Jim, Jo, Peter, George, Willis, Abby, Cloe, Charity, Winny and Child, Ann, Jane, Harrison, Robertson, Moses, Betsy, Harriet, and also two small infants whose names are not known; that said negroes were placed in his possession, and these remained on the plantation devised to him up to the time of his death. It likewise appearing, that the said James G. and Henry L. both qualified and took upon themselves the execution of said trust, and that the said Henry L. continued to act as executor until his death. It likewise appearing to the court, that the said Henry L. Booker departed this life testate on the — day of —, 1842, leaving his wife, Mary Ann Booker, without any issue then born, and that there is now no issue of said marriage living; and appointed William B. Porter and James G. Booker his executors, who afterwards qualified and took upon themselves the execution of said trust. And the court being of opinion, after full deliberation had, and argument thereon, that all said property above specified as given to Henry L. Booker by the will of Peter R. Booker, vested absolutely in the said Henry L. Booker; but that the clause in said will intended to limit said property over to said P. R. Booker's surviving children, in the event of the happening of any of the several contingencies therein specified, is inconsistent with the absolute right of property and power of disposition vested in said Henry L. by virtue of the will of said Peter R. and is inoperative and void. It is therefore or-

[Booker et als. vs. Booker et als.]

dered, adjudged and decreed by the court, that the said Henry L. Booker in his lifetime was, and that his legal representatives now are, entitled to keep, possess and enjoy, absolutely and in fee simple, all the land and other real and personal property devised to the said Henry L. and to the one half of the two tracts of land in Mississippi, for his services as executor of the will of said Peter R. Booker, deceased; and that the complainant, surviving as executor of Peter R. Booker, has not, nor have any of the heirs of Peter R. Booker, as heirs or devisees of Peter R. Booker, deceased, any right to any portion of any of said property. It is further ordered, adjudged and decreed by the court, that complainant's bill be dismissed; that the injunction heretofore granted be dissolved, and that the complainant James G. Booker pay the costs of this suit out of the funds of the estate of Peter R. Booker, deceased, and that execution issue for the same as at law.

From this decree the complainants appealed.

S. D. Frierson and *Houston*, for complainants.

M. Frierson, *Nicholson* and *Humphreys*, for defendants.

GREEN, J. delivered the opinion of the court.

The bill is filed in this case by the executor of Peter R. Booker, deceased, for a construction of his will.

After having devised to his wife and to each of his children various legacies, the testator says: "Should any of my children die without coming to maturity, or die without issue, either before or after coming of age, or should leave issue, which issue should die before coming of age, in either of these events such portion of my estate so bequeathed to such child or children is to be equally divided between my surviving children."

The principal ground of controversy in this cause is upon the construction of the above recited clause of the will. Henry L. Booker, one of the sons of the testator, married, and died without issue then living, but a child born after his death died a

[Booker et al. vs. Booker et al.]

short time thereafter. Henry L. Booker made a will, by which he disposed of the property which had been devised to him in his father's will. It is insisted by Henry L. Booker's representatives, that the limitation in Peter R. Booker's will to his surviving children depends on an indefinite failure of issue, and is therefore too remote to constitute a good executory devise. To constitute a valid executory devise, the contingency upon which it is to take effect must occur within a life or lives in being and twenty-one years and a fraction of a year afterwards. If then it is limited to take effect upon the failure of issue, that failure must be definite, and certain to happen within the period above mentioned. For if the limitation be upon an indefinite failure of issue—that is, upon the extinction of the whole line of descendants—it is too remote, as tending to the creation of perpetuities, and is therefore void, and the property vests absolutely in the first taker. It becomes therefore a matter of the greatest importance whenever these words, “dying without issue,” are used, to understand what they mean; whether they mean a dying without issue living at the death of the first taker, or whether they mean a general or indefinite failure of issue.

In the case of *Forth vs. Chapman*, (1 P. Williams, 663,) Lord Chancellor Macclesfield took a distinction between an executory devise of real and personal property; holding, that in the former case, the words “dying without issue” made an estate tail, because the words meant an indefinite failure of issue; but that with respect to personal property which was transient and perishable, the testator could not have intended a general failure of issue, and therefore in regard to that species of property the testator must have meant, without issue at the death of the first taker.

This distinction has been recognized in many subsequent cases. The question, therefore, as to the meaning of these words in the will, is a question of intention; and although an artificial legal sense has been affixed to the words “dying without issue,” so that taken alone they mean an indefinite failure of issue; yet any clause or circumstance in a will which indicates or implies such intention, will confine the sense to a dying without

[Booker et al. vs. Booker et al.]

issue then living. Thus controlled, these words have their vulgar meaning; but otherwise, they are to be understood in their legal senso. Thus in the case of *Pells vs. Brown*, (Cro. Jac. 590,) the K. B. held that the sense of these words was controled by the intention of the testator, indicated by other words used in connection with them. In that case, the testator devised his land to his son T. and his heirs forever, paying to his brother R. 20 pounds when of age; and if T. died without issue living W. his brother, then the devise was to W. and his heirs and assigns, he paying the 20 pounds to R. The court held, that T. took an estate in fee, and not an estate tail; and they relied on the fact, that he was directed to pay the legacy to R. which implied a fee, and because the clause "if he died without issue" was not absolute and indefinite; for the will added, if he died without issue "living W." Here the super-added words "living W." and the direction to pay the legacy to R. were sufficient indications of the intention of the testator, to control the legal sense of the words "die without issue." Lord Kenyon, in *Potter vs. Bradley*, (3 Term R. 146,) extols the case of *Pells vs. Brown*, as the *magna charta* of this branch of the law. It certainly has never been denied to be law, although some eminent judges have not fully approved its reasoning. It is not deemed necessary to enter into an examination of the cases on this subject. The conclusion of Mr. Fearne upon all that had been decided, when he wrote his learned treatise, is, "that though in the limitation of a personal estate, after a dying without issue, those words shall not *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a dying without issue living, even though the limitation is in the nature of an estate tail by implication only; yet on the other hand they shall not *ex vi termini*, where there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail; but that in either case, if the limitation rests solely upon the usual extent and import of these words, the limitation is too remote, and therefore void, and the whole vests in the first devisee, or legatee; but that in either case the signification of those words may be confined to a dying without issue

[Booker et aln. vs. Booker et aln.]

then living, by any clause or circumstance in the will which can indicate or imply such intention." 2 Fearne, 260.

Having thus before us, the rule of construction, by which we are to determine the meaning of the words "dying without issue," we will turn our attention to the clause of the will under discussion.

The testator provides that if any of his children "die without issue, or should leave issue, which issue should die before coming of age, in either of these events such portion of my estate so bequeathed to such child or children is equally to be divided between my surviving children."

In this clause the testator seems to have specially intended to postpone the limitation to the longest period the law would allow, and to provide that the contingency must happen within the time. The devise is to his children; but if any of them die without issue, or if such issue die before coming of age, then over, &c. Here the contingency must happen within the period of a life in being and twenty-one years after. For if a child die, leaving issue, which issue dies before coming of age, the death of such issue must necessarily be within twenty-one years and nine months of the death of the parent.

Upon a dying without issue, the estate is to be equally divided between the surviving children. These words "surviving children" are very expressive of the testator's intention. In the event contemplated, the estate bequeathed to such child is to be equally divided between the surviving children. These terms in such juxtaposition show that "child" and "children" are employed in the same sense, to express a like relation to the testator. Besides, the term "children" expresses the immediate offspring of the parent: neither in its vulgar or its legal sense is it expressive of remote descendants: to make it so mean it must be coupled with other expressions which will give to it such a signification. Here there are no such expressions; on the contrary, the entire clause is pregnant with evidence that the term "children" is used in its appropriate sense to signify the immediate offspring of the testator. The contingency, then, is to happen within the life of some of the testator's children, and is therefore definitely restricted within the time the law allows.

[Booker et al. vs. Booker et al.]

But it is insisted, that Henry L. Booker, the first taker, had an unlimited power of disposition by the will, because the devise vests in its terms a fee simple estate in him; and having such estate, he had the right to dispose of it. No such consequence as is supposed results from the simple fact that the devisee took an estate in fee; for one of the peculiarities of an executory devise is, that a fee may be limited upon a fee, which in a contingent remainder cannot be done.

It is insisted, that as by the will Albert Booker manifestly has an unlimited power of disposition over the property devised to him, we are to suppose the testator intended to place all his sons in like circumstances, and therefore that he intended Henry should also have a like power of disposition. No such legal inference can be drawn from the devise to Albert as the one here insisted on. We cannot tell what motives the testator may have had in creating a distinction in the estate devised to his sons. If the argument were sound in this case, it would be applicable in any case of a will, where a difference would exist in the devises to the testator's children; and we should be called upon to remodel men's wills, instead of expounding the meaning of the words they have employed.

We therefore think, that as it regards Henry L. Booker, the executory devise is good, and that his brothers and sisters take the estate which was given him in his father's will.

2. As it regards Albert Booker's estate, the provisions of the will give him a power of disposition wholly inconsistent with the limitation over. After giving him a tract of land, and six thousand dollars worth of negroes to be given him on his arriving at the age of twenty-five years, the will proceeds: "And as a means of support and encouragement from the time he arrives at the age of twenty-one years till twenty-five, he is to have one third of the net profits of the plantation, after paying all expenses; and my executors hereinafter named are to keep a force not less than twenty-four average hands. I give him also on coming of age, one saddle horse, worth \$125; and I give him, on coming of age of my youngest child, one of my tenements, a store and counting room, with one third of the lot on which my houses are situated in Columbia. The property thus given

[Booker et al. vs. Booker et al.]

not to be disposed of until he is twenty-five years of age, except by consent of my executors."

In the concluding clause above quoted, it seems clear that the testator intended to give an absolute power of disposition of the estate after Albert should arrive at twenty-five years of age. When it is said, he is not to dispose of it until he arrived at the age of twenty-five years without the consent of the executors, it is implied that he may dispose of it, with their consent, before he is twenty-five, and that after he arrives at that age he may make such disposition without their consent. We cannot more clearly express our approbation that a thing may be done, than to forbid it except upon the happening of a certain event. All men would understand that upon the event happening, the right to do the thing had been granted. It would have been absurd for the testator to limit the right to dispose of the property unless the executors consent, or unless he arrive at twenty-five years, if he did not intend that upon either of these occurring he might dispose of it. In the case of *Jackson vs. Bull*, (10 John. R. 19,) the testator devised to his son Moses and to his heirs and assigns forever a lot of land, and then added, that in case his son should die without lawful issue, the property he died possessed of he gave to his son Young.

The Supreme Court of New York decided, that the limitation over by way of executory devise was void, because repugnant to the absolute power of disposal given by the will to Moses, who was thereby enabled to defeat it.

The same principle is decided in the Court of Errors of New York, in *Jackson vs. Robins*, (16 John. R. 537,) upon a like provision in the will of Lord Stirling.

It is true, in this case the devise is not, as in those cases, to the devisee and his heirs and assigns forever; but the property is devised to his son Albert, and that by our act of 1784 is to be deemed and construed to be a devise in fee simple, unless by some part of the will it appears that the testator intended to convey an estate of less dignity. Unquestionably, the words used in this will much more strongly express the testator's intention to give a power of disposition, than do the words in the New York cases, by the devise to heirs and the devise over

[Booker et al. vs. Booker et al.]

of the property he died possessed of. The absolute power of disposing of the property devised to Albert being thus given in the will, the subsequent limitation by way of executory devise is void, and he takes the estate free from the operation thereof. So this court held in the case of *Thompson vs. McKissick*, (3 Hump. 621,) *Davidson vs. Richardson*, (10 Yerg. R. 290,) *Smith T vs. Bell*, (Mart. & Yerg. 302,) in each of which cases this question was directly decided.

We therefore think the executory devise, so far as it relates to Albert's portion of the estate, is void; but that it is good as to the bequests to Henry which had been made in the preceding part of the will. But this limitation does not touch the residuary clause, nor does it apply to the specific legacies subsequently given, except in such cases as the restriction is again repeated in reference to those legacies specially. This is plainly the intention of the testator; for having first given to his wife, and then to each of his children successively, specific legacies of land and negroes, he then adds the clause in question, in which he provides that if any child should die without issue, the portion "so bequeathed" is to be equally divided between the surviving children. The words "so bequeathed" relate specially to the bequests that had been made in the preceding clauses of the will, and have no relation to, or influence over subsequent devises.

The subsequent portions of the will and the codicils sufficiently indicate that this was the intention of the testator, if the meaning of the clause in question were less clear and needed such aid.

The testator had a large estate, and he intended to place a portion of it under such restrictions as to provide a sure support for his children, and to protect them from the casualties or mismanagement by which estates are so frequently squandered, and at the same time he did not choose to tie up the whole estate from the free enjoyment and disposition of his legatees.

But the second residuary clause in the will provides, that "after the coming of age of my youngest child, and the allotting to each the portion herein bequeathed, it is my desire that the

[Booker et al. vs. Booker et al.]

whole of my estate of what kind soever be equally divided between the whole of my children then living."

Inasmuch as Henry died before the youngest child came of age, his devisees are excluded from taking any portion of the residuum by the limitation to the children then living.

But in the codicil, the testator in the third item devises to his son Henry 2000 dollars of his stock in the Union Bank, in discharge of Henry's claim for work done on the Franklin and Columbia Turnpike road. In the fifth item he gives his sons James and Henry 640 acres of land in Desoto county, Mississippi, and 640 acres in Lafayette county, Mississippi, as compensation for the trouble and responsibility of executing his will.

These bequests are free from the limitations of the will; and as Henry qualified and acted as executor, the devise to him of the 640 acres of land vested on his qualification as executor, and, together with the 2000 dollars of Union Bank stock, was his absolute property at his death, and passes by his will.

The decree must be reversed, and modified as herein indicated.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

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**JACKSON: APRIL TERM, 1845.**  
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HAND *et als.* vs. THE STATE.

The act of 1803, ch. 18, sec. 1, authorizing judgment "on motion of the party aggrieved" against any sheriff or other officer who shall fail to return an execution on or before the second day of the term, authorizes judgment by motion against such officer for failure to return executions in State cases.

A judgment in this case was rendered in the Circuit Court of Perry county, against Hand the sheriff and his sureties, for a failure to return executions for fine and costs in favor of the State against divers individuals. This judgment was rendered by the presiding Judge, Totten; from which the defendants appealed.

Bullock, for the plaintiffs in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

A. B. Hand, sheriff of Perry county, received in his hands sundry executions in the name of the State of Tennessee, which he failed to return according to law. The solicitor for the State, at the January term, 1844, of the Circuit Court of Perry

[*Hand et al. vs. The State.*]

county, obtained judgment against him on motion for the amount of fine and costs, as specified in the executions. To reverse which, this writ of error is prosecuted.

The counsel for the plaintiffs in error now contends that there is no law warranting a proceeding on behalf of the State, by motion, for such neglect on the part of the sheriff, in failing to return the executions. This makes it necessary to look into the statutes upon the subject.

The act of 1803, ch. 18, sec. 1, provides that "if any sheriff or other officer of this State shall fail or refuse to make return of any execution that may have come to his hands, issued from the Clerk of the County or Circuit Court where such officer resides, on or before the second day of the term to which such execution is made returnable, judgment may be rendered against such officer and his sureties, for the amount of the money and costs mentioned in such execution, on motion of the party aggrieved, and proof that such execution came to the officer's hands."

The fair construction of the words "party aggrieved" is the plaintiff in the execution, and is as well applicable to the State as individual suitors. This has never been doubted; in fact, judgments have been rendered again and again, against sheriffs and coroners in favor of the State, in such cases; and it is right and proper that it should be done. But it is argued, that inasmuch as statutes have been enacted, by which persons entitled to cost, viz, clerks, witnesses, &c. may move individually for such cost against the defaulting officer, that the power on the part of the State so to do, is repealed. To this argument we cannot yield our assent. The manifest import of those statutes is, to give relief to those entitled to costs, when the plaintiff in the execution will not move himself; so that they may not be remediless,—but still leaving in all cases the power to the plaintiffs to protect themselves, and all others interested in the execution, by this remedy if they please. And the necessary consequence of such movement on the part of the plaintiff, is to suspend the right of others interested, from a like action. To hold otherwise would be productive of much mischief; for as it would necessarily prohibit the plaintiff in an execution

[*Hand et alr. vs. The State.*]

from moving for any thing else than what is coming to him individually, it forces a motion in behalf of every individual claiming, and entitled to, costs under the execution.

The decision made at the last term of this court upon the statute of 1833, ch. 43, has no application whatever to this case. That statute makes it the duty of the Attorney General "on the second day of each and every term of the County, Circuit or Supreme Court held in his district, to call upon the clerk of said court for his execution docket. And if it shall appear that an execution or executions have been placed in the hands of any of the sheriffs of this State, upon which any amount may be endorsed for fine, State tax, &c. which amount when collected would properly belong to the State or County revenue, or common school fund, and said execution has not been returned, it shall be the duty of said Attorney General to move for payment against such sheriff and his sureties, in favor of the State, County, or any other, for such sums as may appear from the execution docket to be due the State or County, or common schools, and other sums due on such executions as have been placed in the hands of the sheriff, and which he has failed to return."

In construing this statute the court held that the power of the State to recover, under its provisions against the defaulting officer in executions in favor of individuals against individuals, was confined to the amount which, when collected, would belong either to the State or County revenue or the common school fund, and did not extend to the principal debt or costs belonging to private persons. But the principle of this decision is not applicable to cases where the State is plaintiff, and which remain as they did under the act of 1803. We therefore affirm the judgment of the Circuit Court.

HAND *et als.* vs. THE STATE.

The act of 1835, ch. 19, authorizes a judgment by motion against a sheriff for a false return of a *fi. fa.* issued in a State case.

This is an appeal by the plaintiffs in error, the sheriff of Perry county and his sureties, from a judgment rendered against them by Judge Totten, presiding in the Circuit Court of that county.

Bullock, for plaintiffs in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

The only difference between this case and the one heretofore determined between the same parties at the present term of the court, is in this: In the present, the judgment rendered on motion in favor of the State is for a false return; in the other it was for a non-return. All the argument of the one as to the position of the State as plaintiff in the execution, and as to the rights and powers given by law as such, is equally applicable to both; and the only question is, whether a plaintiff in an execution can recover a judgment on motion against a sheriff, coroner or other collecting officer, for a false return upon an execution.

The act of 1835, ch. 19, settles the question. It provides, "That if any sheriff, coroner or other officer has failed, or shall hereafter fail, to make due and proper return of any execution from any court of record in this State, and to him directed, and received by him; or has failed or shall hereafter fail to pay over the money on any execution, after the same is or shall be returned satisfied, in whole or in part, or making false or fraudulent return; such sheriff, coroner or other officer, and his sureties, shall be liable to a motion in the Circuit Court of the county from which the execution issued, and judgment shall be rendered against them for the amount due upon said execution, or for the amount collected by such sheriff, coroner or other officer,

[*The State vs. Benthall et al.*]

with interest thereon, together with twelve and one half per cent. damages."

This statute gives the remedy by motion in all cases of false return, and equally protects the State and private individuals.

Let the judgment be affirmed.

THE STATE *vs.* BENTHAL *et al.*

An indictment charged, that two persons with force and arms, &c. "did make an affray by fighting:" It is held, that this charge of a fighting was sufficiently certain and definite, and the indictment valid.

Attorney General, for the State.

Adamson and *Bullock*, for the defendants.

TURLEY, J. delivered the opinion of the court.

The defendants were indicted and convicted in the Circuit Court of Madison for an affray, and sentenced to pay one dollar each and the costs, and to remain in custody until the same was paid. But the judgment was afterwards arrested and the defendants discharged; from which the State prosecutes an appeal.

The judgment was arrested upon a supposed defect in the indictment in not being sufficiently certain and specific in charging the offence. The words of the indictment are as follows: "Jesse Benthall and Thomas Pemberton, on the 1st day of April, 1844, with force and arms, at Jackson, in the county aforesaid, being unlawfully assembled together and arrayed in a warlike manner, and then and there, in a public place, unlawfully and to the great terror and disturbance of all the good citizens of said State then and there assembled, did make an affray by fighting, in contempt of the laws of the State."

It is now argued, that the allegation "did make an affray by fighting" is vague and uncertain; that it is necessary, to

[*Mewborn vs. Glass*, adm'r.]

constitute the offence charged, that the defendants should have fought each other, and that it may well be, from the wording that the violence complained of may have been a combined attack by the two defendants upon others, who were unresisting, and that if this were the case, (inasmuch as to constitute an affray it is necessary that two or more shall fight together in a public place,) no offence as charged has been committed.

We think that such is not the legitimate conclusion of the words of the indictment; but that it is, that they did fight each other. If it be said two men are fighting, two men have been fighting, every body understands that they are or have been fighting each other; and when it is charged in a bill of indictment that two men did make an affray by fighting in a public place, it must be understood that they fought each other. A different construction would be an abstract refinement.

Reverse the judgment of arrest, and affirm the judgment of conviction.

MEWBORN vs. GLASS, adm'r.

Where an unjust judgment has been recovered, and it does not clearly appear to the court that a defence could have been made by proper plea at law, relief will be granted in chancery.

This bill was filed in the Chancery Court at Sommerville by Joshua Mewborn, to restrain the collection of a judgment recovered by Charles Gholdson against said Mewborn. The case was tried by Chancellor McCampbell, on bill, answer, replication and proof. The bill was ordered to be dismissed, and complainant appealed.

W. H. and J. C. Humphreys, for complainant.

G. D. Searcy and S. McLanahan, for the defendant.

[Mewborn vs. Glass, adm'r.]

RESEK, J. delivered the opinion of the court.

In 1836, complainant and the intestate of the defendant entered into a covenant in which it was stipulated that complainant should, by the 15th September in that year, deliver 17 bales of cotton at Griffin's gin; which cotton weighed 8856 lbs; and intestate covenanted to pay 15 cents per pound, and advanced at the time the covenant was made \$400. Before any cotton was delivered, complainant became apprehensive as to the solvency of the intestate, and the parties thereupon, after the 15th September, entered into a verbal agreement varying the terms of the covenant in this, that the 17 bales of cotton were to be delivered at Randolph to Read & Co. and by them to be shipped on account of complainant and intestate, to New Orleans, and the proceeds to be retained by said house, and so much thereof as 15 cents per pound, to be paid to complainant, and the excess, if any, to intestate. And if the cotton should not bring 15 cents per pound, so much was to be paid by the intestate to the complainant, as added to the actual proceeds, would make the original amount of 15 cents per pound in the covenant stipulated to be paid. The cotton brought less than 15 cents. But Read & Co. to whom the intestate was indebted, paid to him the \$400 advanced by him when he entered into the covenant, by giving him credit in their account with him. The intestate brought at law an action of covenant against the complainant for the non-delivery to him at Griffin's gin of the 17 bales of cotton; in which action the defendant attempted to resist the recovery, upon the parol agreement and state of facts above set forth. But by what form of pleading does not appear to us—no transcript of the record in the suit at law having been produced in evidence in this cause: the attempt was unsuccessful; and the intestate of defendant recovered against complainant a judgment for about the sum of \$469. The state of facts above set forth has been satisfactorily proved in this cause; and the complainant is equitably entitled to be relieved against said judgment, unless we are prepared to say that he had, under the circumstances, a plain and available defence at law,

[*Mewborn vs. Glass, adm'r.*]

free from difficulty and embarrassment. If, according to the jurisdiction and course of a court of common law, it be doubtful whether the grounds of the complainant's defence were legally available, it becomes the duty of this court to extend to him the benefit of the remedy invoked. The precise case is this: a modification of some of the terms of a covenant containing mutual and independent stipulations, took place; which verbal agreement to modify took place after the time stipulated in the covenant for the performance of its stipulations; and which agreement left some portions of the original covenant in full force. It has not been shown to us in argument, or by the production of authority, that according to the course of the common law, a plea of accord or other plea, would have been valid, which embraced the facts herein set forth. And without feeling ourselves called upon to hold that no available plea could have been framed and pleaded; we are prepared to hold all that in order to oust jurisdiction it is necessary that we should hold, that the case does not enable us to assert that the defence of the complainant, if any, at law, was free from doubt, difficulty and embarrassment. In such case it is our duty to grant the relief prayed for, and we decree accordingly.

CARROWAY *et als.* vs. THE STATE.

Where defendants were indicted jointly, jointly tried, and a joint judgment rendered against them for a riot; it is held, that the Attorney General is entitled to but one tax fee.

Carroway and five others were indicted in the Circuit Court of Obion, for a riot.

They pleaded not guilty, and were tried at the June term, 1844. They were found guilty and a judgment rendered against them, that they "pay a fine of five dollars each and pay the costs of prosecution."

They were jointly indicted, jointly tried, and one judgment rendered against them.

The clerk taxed a fine of five dollars against each of the defendants for the Attorney General of the State, and a *fi. fa.* issued therefor against them.

The defendants applied and obtained a writ of *supersedeas* to stay the collection of the sum of \$25.

At the November term, 1844, the defendant moved the court to quash the execution. This motion was overruled and the petition dismissed.

The defendants appealed.

Raines and S. Williams, for the plaintiffs in error.

Attorney General, for the State.

Per Curiam. The judgment of the Circuit Court must be reversed. In the case exhibited in the record, the Attorney for the State is entitled to but one tax fee. The execution must be quashed.

PERRY vs. WOOTON.

1. An administrator is bound to use due diligence in the collection of debts due the estate, and if debts are lost by his failure to sue in due time, he is responsible personally to the distributees.
2. If distributees agree that an administrator may indulge the debtors to the estate, and by such indulgence the debts are lost, they have no right to complain.
3. The fact, that an administrator regarded himself personally liable, and expressed himself to that effect, would not change the facts, nor constitute a liability which the law did not raise upon the facts of the case as exhibited in proof.

This bill was filed by Perry against Wooton, executor of Perry deceased, and against Jones, in the Chancery Court at Huntingdon, for an account of the estate of Perry, deceased. Complainant was one of the legatees, and Jones and his wife entitled to the other share.

This bill charges the administrator with negligence, in failing to collect a note for \$1,400, on Armour & Cromwell, executed to the deceased in his lifetime.

The answer denied the neglect, but charged, that the delay in taking steps to collect the money, took place with the consent and approbation of complainant and the other legatee.

The case was tried at the August term, 1842, by Chancellor McCambell, on bill, answer, *pro confesso* judgment, and proof, and the bill was dismissed.

The complainant appealed.

Totten, for complainant.

If a person accept the trust of executor, he must perform it. He must use due diligence, and not suffer the estate to be injured by his neglect. 2 Williams Ex. 1111 and 1112: *Lawson vs. Copeland*, Brown's Rep. 156: *Powell vs. Evans*, 839: *Tibbs vs. Carpenter*, 1 Mad. 298: *Cartwright vs. Cartwright*, 4 Hay. 135: *Shultz vs. Pulver*, 11 Wend. R. 363.

That the note on Armour was lost by neglect, when it could have been collected or secured by ordinary diligence, there is no doubt. The note was due for two years—was without security, real or personal. Is there any excuse for this neglect? It is pretended, the delay was in virtue of an agreement with the plaintiff. There is no proof of this fact. It is true Mr. Ar-

5 vs

[Perry vs. Wooton.]

mour states, that Perry was willing to take notes on Randolph, and Armour & Cromwell's note for the balance due to him, Perry.

But, then, this was no agreement—it was not carried into effect. And it does not appear that Perry ever authorized the executor to wait—or ever stated to him that he was willing to wait. No arrangement then was ever entered into between Armour Wooton and Perry to give time. All parties no doubt deemed Armour solvent till some time in 1839.

But it was not the business of Perry to advise or prompt the executor. Perry was only interested as to part of the note. The executor was willing to delay, and advised Armour to get the consent of the legatees. It was incumbent on the executor to act for all, and independently of any legatee.

Add to this the fact, that the executor charged himself with the amount of the note in his final settlement, which is of record, and charged commissions for the settlement of this note.

And further, the executor, in view of all the facts, admitted that he was liable for the note; because he had neglected to collect or secure the note. He of course knew what facts did occur, and in view of them, he considered himself liable. The fact is Mr. Wooton delayed, and yet he charged himself with the note; because he considered that Mr. Armour would be able at any time to make prompt payment.

The deliberate acts of charging himself with the note as cash, and claiming commissions on it; and, also, admitting the liability, on account of the neglect in not collecting or securing the note, must explain the other doubtful facts, and fix the liability of the executor.

The case is much stronger against the executor, than some of those referred to. He that assumes the office of executor should perform it with diligence and good faith. The rule should be reasonably strict, for the benefit of the *cestuis que trust*, who are generally minors, and in most cases unable to charge neglect and improper conduct on an executor, even where he is guilty.

The law defines his duty; it is plain and simple, and let that be the rule to govern him.

[Perry vs. Wooten.]

Burrow and McCurry, for complainant.*McLanahan*, for defendant.

GREEN, J. delivered the opinion of the court.

The defendant is executor of Nathaniel Perry, deceased, the father of complainant. And the only matter of dispute in the cause is, whether he is chargeable with negligence for failing to collect a note of fourteen hundred dollars, due the estate from David Armour & Cromwell.

Nathaniel Perry died in the spring of 1838, and David Armour & Cromwell were solvent and the note could have been collected at any time until the spring of 1840.

It is admitted that the failure to collect this note for so long a time, would have been culpable negligence on the part of the executor, and would have rendered him personally liable for the money, but for the complainant's interference, and his acquiescence in the forbearance of the executor.

It appears that David Armour & Cromwell were merchants in Jackson, of high standing, and were greatly respected by the testator and his son, the complainant. The money due on the note, had been loaned to Armour by the testator, who desired it to remain in Armour's hands until it was needed, and the note had been executed a short time before the testator's death, through the agency of the complainant, and a memorandum was placed on the note, that if the money should not be called for in twelve months, the obligors were to pay eight per cent. interest. The note was in the hands of the complainant when the testator died, and he continued to retain it, with the permission of the executor, until a short time before the failure of D. Armour & Cromwell.

In the fall of 1839, Jones, one of the legatees, who lived in North Carolina, came to Tennessee for his share of the residue of the estate. Armour was notified by the executor of Jones' intended visit, and was informed that he wished to settle up with the legatees.

To enable the executor to settle with Jones, Armour paid

[Perry vs. Wooton.]

about three hundred dollars on his note, and not finding it convenient to raise the balance, he applied to the executor for further indulgence, who referred him to the legatees. Armour applied to the complainant, who was the principal legatee, who told him, "he did not particularly need the money, and as for himself he was willing to wait." The complainant also said he was willing to take a note on David Armour & Cromwell for his part.

This conversation was communicated to the executor, who made no further effort to collect the money; and the house of D. Armour & Cromwell soon afterwards failed, whereby the debt has been wholly lost to the estate.

The question upon these facts is, whether the defendant was guilty of negligence, in failing to collect this money for the two years within which the debtors were solvent, after it was due.

Unquestionably an executor is bound to use diligence in discharge of his duties, and not to permit the estate to be injured through his neglect. 2 Williams Ex'rs, 1111 and 1112. And if there were no fact in this case to excuse the defendant, he would certainly be liable for the money which has been lost by the insolvency of these debtors to the estate. But under all the circumstances, we think he was excusable for the delay.

The complainant told Armour at the time the note was given he wished the money to remain in his hands until it was needed. All parties had the most unbounded confidence in the solvency of D. Armour & Cromwell, and the testator and his legatees seem to have entertained great respect and kindness for David Armour. All parties felt that the money was entirely safe in Armour's hands, and the complainant, as well as his father, doubtless desired it to remain there until it was needed.

There seems to have been a constant communication and friendly understanding between the executor and the complainant upon the subject. Hence the complainant retained possession of the note more than a year after the defendant qualified as executor, and when the debtor desired further indulgence, he was referred to the legatees (of whom the complainant was the principal legatee) to obtain their consent. When, at last, Jones came to this country for his legacy, and the executor

[Perry vs. Wooten.]

wished to settle up the estate, the complainant told Armour he did not need his money, and was willing to wait, and take the note of D. Armour & Cromwell for his share. These dispositions of the complainant towards Mr. Armour, manifested so late as the winter of 1839, are satisfactory proof, that he had all along approved the delay of the executor to collect the note. The testator owed no debts, and the executor had no use for the money, but to pay off the legacies. Had he collected it, the interest would have ceased, and the parties entitled to the fund, would have failed to realize the 8 per cent. interest Armour had promised to give, and would have deemed their money in hands no more safe, than in those of the debtors. They, therefore, did not wish the executor to collect it, and with this feeling on their part, he was well acquainted.

In this view of the case, the defendant cannot be regarded as culpably negligent for failing to do that which he knew those who were interested in the fund desired him to refrain from doing.

Much stress is laid upon the fact, that the defendant said, after the failure of D. Armour & Cromwell, that he had rendered himself liable for the debt. His opinion, that he was liable, would not change the facts, nor constitute a liability which the law did not raise upon those facts.

The complainant is entitled to a decree for one-half the sum in the defendant's hands, according to his settlement with the County Court, excluding the note on D. Armour & Cromwell, and each party will pay half the cost.

TRIGG vs. READ.

1. The general rule of law touching the validity of contracts made under mistake is, those made under a mistake as to law are obligatory, and those made under a mistake as to facts are not obligatory.
2. The general rule touching the invalidity of contracts made under a mistake of facts is thus qualified: The facts about which there has been a mistake must be of a material nature and such as the party injured could not have by reasonable diligence acquired the knowledge of when put on enquiry.
3. Where the vendor procured the rescission of a contract for the sale of real estate by withholding from the vendee information of the validity of his title, this is declared direct fraud and the contract of rescission pronounced void.
4. Where a compromise of controverted rights is entered into, if both parties are in equal ignorance of the true state of those rights, such compromise is valid; and this whether the doubt rests upon a matter of fact or of law.
5. If an executory contract has been obtained upon an inadequate consideration, or if it has been made by defendant in ignorance of his rights either as to law or fact, such contract will not be enforced specifically by a court of chancery.

This case was tried by Chancellor McCampbell, on bill, answer, replication and proof, at the August term, 1843, of the Chancery Court held at Huntingdon. A decree was rendered in favor of the complainant Trigg, from which defendant appealed.

The case was argued by *W. T. Brown* and *Totten* for the complainant, and *M. Brown*, *McLanahan* and *Talbot* for the defendant.

TURLEY, J. delivered the opinion of the court.

Alanson Trigg, the complainant, on the 3d day of September, 1833, sold and conveyed by deed in fee simple a tract of land, situated in the county of Madison, containing six hundred and forty acres, to the defendant, Thomas Read, for the consideration of three thousand three hundred dollars, to be paid in two annual instalments, one due on the 25th day of December, 1834, the other on the 25th of December, 1835. Immediately upon the sale, defendant went into possession, and in February, 1835, paid seven hundred and sixty dollars, part of the purchase money.

On the 16th day of May, 1825, William Trigg purchased the

[Trigg vs. Read.]

tract of land, which is the subject of controversy in this case, from the Cumberland Steamboat Company, and received from it a deed in fee. This purchase was made in part by William Trigg, for himself and his brother Alanson, the present complainant.

On the 10th day of July, 1827, W. Trigg executed to his brother Alanson a deed of relinquishment to one half of the land thus purchased from the Cumberland Steamboat Company, having at a date previous thereto covenanted to convey by deed in fee simple the other half to Alanson Trigg, senior, the father of the said William and Alanson, junior.

On the 5th day of December, 1826, Alanson Trigg, senior, made and published his last will and testament, by which he devised the half of the tract of six hundred and forty acres thus purchased and covenanted to be conveyed from his son William to his son James, and appointed his son William one of his executors, who proved the will and took upon himself the burthen of its execution.

On the 24th day of May, 1833, James Trigg conveyed, by deed of bargain and sale in fee simple, the three hundred and twenty acres (bequeathed to him by his father, A. Trigg, sen'r.) to his brother A. Trigg, junior: his deed was executed to perfect a contract to convey, entered into between the said James Trigg and Alanson, senior, in the month of August, 1827, from which date Alanson has been in uninterrupted possession of the premises, either by himself personally or by those claiming under him. His title then at the date of his sale to the defendant was supported by the following muniments: a deed of relinquishment for the one half of the premises from his brother William; a deed for the other half from his brother James, who claimed as devisee under his father's will, and a bond from William Trigg to the devisor for the conveyance of the legal title to that half, and an uninterrupted possession of more than seven years without any suit at law or equity to disturb that possession on the part of William Trigg or others claiming through or under him. But there were none of these evidences of title recorded, and the bond from William Trigg to Alanson Trigg, sen'r. was mislaid: the consequence of which was that the defendant Read

[Trigg vs. Bond.]

became apprehensive that his title, as acquired by his purchase from Alanson Trigg, sen'r. was defective, and refused to make further payments of the purchase money. The complainant either was or affected to be equally apprehensive of the invalidity of his title to the one half of the land, as obtained through his purchase from James Trigg; and availing himself of the fears of the defendant, which fears, we think we are warranted from the proof in saying, he stimulated and increased. He procured from him a contract on the 5th day of July, 1835, agreeing to a recession of the contract of purchase of the 3rd of September, 1833.

This contract of recission is executory, and this suit is commenced to enforce its specific execution.

It appears from the proof in the case, that during the period of time which elapsed from the date of sale in 1833, to the date of the contract of recession in 1835, the land had appreciated in value to nearly one hundred per cent; that the defendant was evidently anxious to retain his contract, and with great reluctance agreed to rescind it; that he did so in ignorance of the fact that a bond for the conveyance of the title of one half of the land had been executed by William Trigg, sen'r. and also in ignorance of the fact that the title of Alanson Trigg, sen'r. had been perfected under the operations of the statute of limitations by seven years possession under the title of James Trigg, devisee of Alanson Trigg, senior.

It also appears, as we think, that the complainant, though not entirely certain of the validity of his title as against William Trigg's heirs, yet had such confidence in it, that he was anxious to have his contract of sale rescinded; that in order to effectuate that purpose he withheld from the defendant the knowledge of the facts upon which his title rested, and induced him to believe that if he did not rescind he would find great difficulty in enforcing his remedy against him upon his covenant of warranty; and to remove this embarrassment, was instrumental in procuring an action of ejectment to be instituted on the part of the heirs of W. Trigg against the defendant, which he had no means of defending, the sole evidence of title being exclusively in the possession of the complainant, and a knowledge of

[Trigg vs. Read.]

the facts would make that title available confined to himself and never communicated to the defendant. The consequence was, that a judgment was rendered against him for the whole six hundred and forty acres, upon which a writ of possession had been issued, and the defendant was hourly in danger of being turned out of possession, and left to his remedy upon a covenant of warranty, and with the threat of the complainant that in the event of an attempt to enforce it, he would be under the necessity of following him to Texas, whither he designed removing himself, without giving the defendant an opportunity of serving process upon him in Tennessee.

In ten days after the contract of rescision, the complainant filed a bill against the heirs of William Trigg, enjoining the execution of the writ of possession in the action of ejectment against the defendant and prays a divestiture of title. This bill sets forth a perfect legal title on the part of the complainant, to the whole of the land; and during the pendency of the suit, the bond from William Trigg to Alanson Trigg, senior, which had been mislaid, was found, and there was no difficulty whatever in procuring a decree of divestiture from the heirs of William Trigg.

Upon ascertaining these facts, the defendant refused to execute his contract of rescision; and the question now is, whether, under all the circumstances, the complainant has the right to force him by a decree in chancery.

That the defendant had a good title to the land in controversy, both in law and equity, and that he agreed to rescind the contract by which he acquired it, through ignorance and mistake, is not questioned; and the only subject for our consideration is, whether the ignorance and mistake be of such a character as vitiates the contract of rescision and excuses him from executing it.

As a general principle, agreements entered into in good faith under ignorance and mistake of law, are held valid and obligatory upon the parties. *Ignorantia legis neminem excusat*. If this were not so, there would be no saying to what extent the excuse of ignorance might not be carried; and if upon the mere ground of ignorance of the law men were permitted to

[Trigg vs. Read.]

overhaul or extinguish their most solemn contracts, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proof.

But the general principle, that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity, is well settled.

The perplexity in the application of these principles always arises out of the difficulty in determining whether the ignorance or mistake has been of law or fact, and this is peculiarly so in the class of cases where the party has acted under a misconception or ignorance of his title to the property, respecting which some agreement has been made or conveyance executed.

This ignorance or mistake is of two kinds: 1st. Ignorance in point of fact of any title in the party. 2nd. All the facts being known, ignorance or mistake of the law in application thereto.

The latter proposition will be examined first, as opening the way to a more complete comprehension of the former.

All the facts being known, when and how does ignorance or mistake of the law as applicable to the right, vitiate a contract relative thereto? The cases upon this point are not easily reconcilable. Indeed it is a question possessing much intrinsic difficulty.

Mr. Story, in his treatise on Equity Jurisprudence, sec. 120, says: "Upon a close survey many, though not all, of the cases upon this point will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief." In the case of *Hunt vs. Rousmanier's adm'r.* 1 Peters, page 15, the Supreme Court of the United States says: "We hold, that mistake arising from ignorance of law is no ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character." In the case of the *Bank of the United States vs. Daniel*, 12 Pet.

[Trigg vs. Read.]

32, the question, whether a mistake of law, stripped of all other circumstances, was relievable in equity, was directly presented and determined in the negative. Such is the language of the court: "Vexed as the question formerly was, and delicate, as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of course can be gone into without hazarding the introduction of exceptions that will be likely to sap the correct principle we intend to apply. Indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions, than upon established rules." To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable is well established, as was determined by the court in *Hunt vs. Rousmanier's adm'r.* and we can only repeat what was then said; that whatever exceptions there may be to the rule, they will be found to be few in number, and to have something peculiar in their character and to involve other elements of decision."

On the contrary, it has been held in England as unquestionable doctrine, "that if a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will relieve him from the effect of his mistake." *Nayler vs. Winch*, 1 Sim. & Steu. 555. But where a doubtful question arises, such as a question respecting the construction of a will, a different rule prevails; and a compromise fairly entered into with due deliberation, will be upheld in a court of equity, as reasonable in itself to terminate the differences by dividing the estate and as supported by public policy. 1 Ves. 126; 2 Jacb. & Walk. 205; 2 B. & Beat. 180.

In commenting upon these propositions, Mr. Story, in his treatise upon Equity Jurisprudence, sec. 126, says: "The distinction between cases of mistake of a plain and settled principle of law, and cases of a mistake of a principle of law not plain to persons generally, but which is yet constructively certain as a foundation of title, is not of itself very intelligible, or, practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law,

[Trigg vs. Read.]

all its rules and principles are deemed certain, although they have not as yet been recognized by public adjudication. This doctrine proceeds upon the theoretical ground, that *id certum est, quod certum reddi potest*; and that decisions do not make the law, but only promulgate it. Besides, what are to be deemed plain and settled principles? are they such as have been long and uniformly established by adjudications only? or is a single decision sufficient? What degree of clearness constitutes the line of demarcation? If there have been decisions different ways at different times, which is to prevail? If a majority of the profession hold one doctrine and a minority another, is the rule to be deemed doubtful, or is it to be deemed certain? Take the case of the construction of a will. Every person is presumed to know the law; and though opinions may differ, before an adjudication upon the construction of the will is made; yet, when it is made, it is supposed always to have been certain. It may have been a question at the bar, whether a devise was an estate for life, or in tail, or in fee simple. But when the court has once decided it to be the one or the other, the title is always supposed to have been fixed and certain in the party from the beginning. It will furnish a sufficient title to maintain a bill for the specific performance of a contract of sale of that title."

These strictures upon the proposition asserted by the English court are, in our opinion, well taken and unanswerable, and they are sustained, as we have seen, by the Supreme Court of the United States.

We therefore think the principle, as settled in the United States, to be, that an ignorance of the law, however plain and settled the principles may be, and a consequent mistake as to title founded upon such ignorance, furnishes no ground to rescind agreements or to set aside solemn acts of the parties, when they have been made with a full knowledge of the facts, unless they be tainted by imposition, misrepresentation, undue influence, misplaced confidence, or suspicion.

Such is the law when the party acts with a knowledge of the facts constituting his right or title.

But we have now to enquire how it is when he acts in igno-

[Trigg vs. Read.]

rance of the fact of his having any right or title, or in ignorance of any material fact constituting or affecting the same.

Mr. Story, in his Equity Jurisprudence, section 122, says: "where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact—that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will in ordinary cases relieve him from the legal effect of instruments which surrender such unsuspected right or title." In illustration of the principle, he refers to the case of *Turner vs. Turner*, 2 Rep. in Chan. 81. That case was this: "The plaintiff's father had left a sum on mortgage to A, who had mortgaged lands to the father and his heirs, with a proviso, that on the payment of the money to the father or his heirs, the premises were to be conveyed to A. The plaintiff was the executor of his father, and claimed the mortgage as vesting in the executor, and not in the heirs. The defendant was the son and heir at law of the plaintiff's elder brother, and set up a release of this mortgage, and an allotment of it to him upon an agreement made among the heirs for a division of the personal estate and subsequent receipt of the mortgage by him. The plaintiff insisted, that at the time of the release he looked on the mortgage as belonging to the defendant, as heir at law, and knew not his own title thereto, and that the mortgage was worth £8,000 and the shares on division only £250 apiece. The Lord Chancellor (Nottingham) relieved the plaintiff."

This case is now referred to, not so much for the case itself, as for the observations of the commentator, Mr. Story, upon it. He says: "It is reported without any statement of the grounds of the decision, so that it is impossible now to ascertain them. There may have been surprise or imposition, or undue influence, or the defendant may have well known the plaintiff's rights and suppressed his own knowledge of them. If it proceeded upon the naked ground of a mistake of law, it is not easily reconcilable with other cases. But if it proceeded upon the ground that the plaintiff had no knowledge of his title to the

[Trigg vs. Read.]

mortgage, and therefore did not intend to release any title to it, the release might well be relieved against, as going beyond the intention of the parties, upon a mutual mistake of law. It might then be deemed in some sort a mistake of fact, as well as of law." From this it is seen that, that able jurist draws a distinction (a reasonable one and supported by authority) between an agreement made in ignorance of the fact of the existence of a right or title, and ignorance of the true legal construction of the right or title. The same commentator, in sec. 130 of the above work, says: "There may be a solid ground for a distinction between cases, where a party acts or agrees in ignorance of any title in himself, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between the parties as to their respective rights. In the former cases, the party seems to labor in some sort under a mistake of fact, as well as of law. He supposes, as matter of fact he has no title, and that the other party has a title to the property. He does not intend to release or surrender his title, but the act or agreement proceeds upon the supposition that he has none."

In the case of *Cann vs. Cann*, 1 P. W. 727, Lord Macclesfield is reported to have said, "that if the party releasing is ignorant of his legal right to the estate, or if his right is concealed from him by the person to whom the release is made, there would be good reason for setting aside the release."

In the case of *Stokely vs. Stokely*, 1 V. & Beams, 31, Lord Eldon seems to have thought that there might be a distinction between cases where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases where the parties act upon a supposition of right in one of the parties without a doubt upon it. The former might be held obligatory when the latter ought not to be; but his lordship admitted that the doctrine attributed to Lord Macclesfield was otherwise. Mr. Story, in commenting upon this case, sec. 129, Equity Jurisprudence, says: "It may be gathered from these remarks, that Lord Eldon's own opinion was, that an agreement made or act done, not upon a doubt of title, but upon ignorance of any title in the party, ought not to

[Trigg vs. Read.]

be obligatory upon him, though arising solely from a mistake of law."

If this great chancery lawyer thought that a legal misconception of a party's title, he having knowledge of the existence of it, by which he is induced to part from it, ought not to be obligatory upon him, how much stronger would have been his opinion in favor of one who had thus parted from his rights without a knowledge of its existence in point of fact, and not upon a legal misconception of it?

In the case of *Lang vs. The Bank of the United States*, Mr. Chief Justice Shippen, in speaking of the effect of mistake of right of a party and that he was not bound by it, said: "the case of *Penn vs. Lord Baltimore* is decisive upon this point. I was present at the argument, and heard Lord Hardwicke say, though it is not mentioned in the report, that if Lord Baltimore had made the agreement in question under a mistake of his right to another degree of latitude, he ought to be relieved, but that he was not mistaken."

This doctrine is so consonant with reason; and a contrary one would be so monstrous in its consequences, that it is strange there should be any controversy about it. In point of fact, when it is properly understood we think there is none.

A tenant for years sells his interest in the premises; the reversioner or remainderman has previously died, bequeathing him the fee, or has conveyed to him by release; of which facts he is ignorant at the time of his contract of sale. Shall the purchaser acquire the fee? Surely not: for the parties contracted for the term, and in mutual ignorance that it had been previously vested with the fee. And so, *vice versa*, if the vendee had bought the fee, believing it to be vested in the vendor, and it turns out that the vendor's interest is but for a term of years, the vendor shall be relieved.

Such is the law, when the contract is made in ignorance of the existence of any right or title in the party. So it is, if it be made with the knowledge of the existence of some right or title, but in ignorance of any material fact affecting the nature or value of this right or title, essential to the character of the contract, and an efficient cause in its concoction.

[Trigg vs. Read.]

The case of *Pusey vs. Desbouvrie*, 3 Peer W. 315, was this: "The daughter of a freeman of London had a legacy of ten thousand pounds left her by her father's will, upon condition that she should release her orphanage share, and after her father's death she accepted the legacy and executed the release. Upon a bill filed afterwards by her against her brother, who was the executor, the release was set aside, and she was restored to her orphanage share, which amounted to £40,000. Lord Chancellor Talbot, in making the decree, admitted that there was no fraud in her brother, who had told her that she was entitled to her election to take an account of her father's personal estate, and to claim her orphanage share; but she chose to accept the legacy. His lordship said: "it is true, it appears the son of the defendant did inform the daughter that she was bound either to waive the legacy or orphanage part. But I hardly think that she knew that she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to, and that when she should be fully apprised of this, and not till then, she was to make her election; which very much alters the case; for probably she would not have elected to accept her legacy, had she known or been informed what her orphanage share amounted to before she waived it and accepted the legacy."

The release in this case was set aside, manifestly upon the ground, that it had been executed in ignorance of the amount of the orphanage share; the complainant would have been entitled to it if she had not elected to receive the legacy. And so Mr. Story says in his comments upon the case, sec. 118, Eq. Jurisprudence, "that the decision of his Lordship rested upon mixed considerations, and not exclusively upon mere mistake or ignorance of the law by the daughter;" but, "upon a far more weighty reason, that she acted under ignorance of facts; for she neither knew, nor had any means of knowing what her orphanage share was when she made her election. It was, therefore, a clear case of surprise in matters of fact as well as of law."

In the case of *McCarty vs. Decaix*, 2d Russ. & Mylne, 614, Lord Chancellor Brougham held, that "when a husband re-

[Trigg vs. Read.]

nounced his title to his wife's property, from whom he had been divorced, under a mistake in point of law, that the divorce was valid and he had no longer any title to her property; and under a mistake of fact, as to the amount of the property renounced, the information respecting which the other party knew and withheld, he was entitled to relief."

Mr. Story, sec. 140, Eq. Juris. says: "The general rule is, that an act done, or contract made under a mistake or ignorance of material fact, is voidable and relievable in equity." And that the "rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud, but also to many cases of innocent ignorance and mistake on both sides," for which he cites numerous authorities. But he says, sec. 141: "this rule as to ignorance or mistake of facts entitling the party to relief, has the important qualification, that the fact must be material to the act or contract, that is, that it must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of a fact, yet if the act or contract is not materially affected by it, the party claiming relief will be denied it." This distinction he illustrates by a familiar case: "A buys land of B, to which the latter is supposed to have an unquestionable title. It turns out upon due investigation of the facts, unknown at the time to both parties, that B has no title, (as if there was a nearer heir than B, who was supposed to be dead, but is in fact living,) in such case equity would relieve the purchaser and rescind the contract. But suppose A was to sell an estate to B, whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it contained only nineteen acres and three fourths of an acre, and the difference would not have varied the purchase in view of either party; in such case the mistake would not be a ground to rescind the contract." So if one person sell a messuage to another, which was at the time swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party a Court of Equity would relieve. So if a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an

[Trigg vs. Read.]

estate tail, and the tenant intail had at the time, unknown to both parties, actually suffered a recovery, and this bound the estate in remainder, a Court of Equity would relieve the purchaser, purely upon the ground of mistake. So if a life estate should be sold, and at the time of the sale, the estate has been determined by the death of the *auter vie*, the person for whose life it was held, and the fact is unknown to the parties, a Court of Equity will rescind the contract. So if one purchase a house, and it is burnt down at the time of the purchase, the fact being unknown. So if one buy a horse, supposed to be alive, but he is in fact dead, a Court of Chancery will relieve by rescinding the contract, if the money be not paid, and if it be paid, by decreeing it to be repaid." Story's Eq. Juris. sec. 141, 142, 143, and the cases there cited. These are all cases of relief, granted to the vendee, when from ignorance of facts existing at the time of his contract, he has not obtained what he contracted for. But there is nothing which constitutes a vendee a greater favorite in a Court of Chancery than a vendor: reverse their situations, that is, let the contract be of such a character, that owing to ignorance of material facts affecting the vendor's right or title at the time of the contract, the contract has been so made as to give the vendee a greater interest than was contemplated to be sold, and the same relief, and upon the same principles will be extended to the vendor.

But it is to be observed, that it is not, however, sufficient in all cases to give the party relief, that the fact is material, but it must also be such as he could not by reasonable diligence get knowledge of when put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence; neither will relief be extended to the vendor on account of his ignorance of some secret intrinsic value belonging to the property sold, and which may have been in possession of the vendee, and not communicated by him; as if A, knowing that there is a mine in the land of B, of which he knows that B is ignorant, should buy the land without disclosing the fact to B, for a price in which the mine is not taken into consideration, A would not be entitled to relief, because they

[Trigg vs. Read.]

have traded at arms-length. B is supposed to know the value and qualities of his own property, and if A, by superior skill or diligence, has ascertained that it possesses a secret value unknown to B, there is nothing in the latter which requires him, if he occupy no other relation to A than that of vendee, to make the discovery. But as we shall see in the further progress of the examination of this case, if the contract made under such circumstances be executory a Court of Chancery will not decree a specific performance of it.

Such is the law when the ignorance is material; much clearer is it where the existence or non-existence of the fact, as the case may be, is within the knowledge of the person who will be benefited thereby, and he withholds it from the person to be injured. This is direct fraud, and a contract thus obtained would be set aside, without doubt or difficulty, at all times. The result may be summed up in the words of Mr. Story: "A mistake or ignorance of facts in parties, is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties, and disappoints their intentions by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But when such party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference, it is strictly *damnum absque injuria*." Story's Eq. Jus. sec. 151. The general results of this examination of the principles and authorities upon which the power of a Court of Chancery to rescind contracts executed by mistake rests, are,

1st. If the contract be made with a full knowledge of all the necessary and material facts, no error arising out of ignorance or mistake of the law in relation to the rights or titles of the parties contracting, unaccompanied with circumstances, either of imposition, misrepresentation, concealment, undue influence, misplaced confidence, or surprise, can constitute a ground for rescinding and setting aside the contract.

2d. If a contract be made in ignorance of the fact of a right

[Trigg vs. Read.]

or title in vendor, the legal construction of which divests him of that right or title, it will be declared void, and rescinded.

3d. If the contract be made upon the knowledge of some right or title in the vendor, but in ignorance of some fact which makes that right or title greater or less than was supposed by the contracting parties, it will, upon the application of the one party or the other as their interest may be affected, be vacated and rescinded.

4th. If the knowledge of the fact be in the possession of the party to be benefitted thereby, the withholding it is a fraud, which will of itself vitiate and avoid the contract in a Court of Equity.

The cases of compromises of doubtful rights and contracts, settling family disputes, of which something more will be said anon, appears to be somewhat more favored (especially the latter) than ordinary contracts of purchase. In relation to this subject, we have seen that Lord Macclesfield, in the case of *Cann vs. Cann*, said: "If a party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person to whom he releases, there would be good reason for setting aside the release." But he adds: "The mere fact, that the party making the release had the right, and was controverting it with the other party, can furnish no ground to set aside the release; for by the same reason there would be no such thing as compromising a suit, nor room for any accommodation. Every release supposes the party making it to have a right." Mr. Story, commenting upon this, sec. 131, Eq. Juris., says: "The whole doctrine of the validity of compromises of doubtful rights rests on this foundation. If such compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties, for the right must always be on one side or the other, and there would be an end of compromises, if they might be overthrown upon any subsequent ascertainment of right contrary thereto. If, therefore, a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right. And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact, or a

[Trigg vs. Read.]

doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or law." But this principle applies only, when the doubts and difficulties, whether of law or fact, are in connection with the rights supposed to be in controversy, and about which the compromise is made. For the same commentator in continuance observes: "It has been emphatically said, that no man can doubt, that the Court of Chancery will never hold parties, acting upon their rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that do arise. But if parties will, with full knowledge, act upon them, though it turns out that one gains an advantage from a mistake in point of law, yet if the agreement was reasonable and fair at the time, it shall be binding. And transactions are not in the eyes of a Court of Equity, to be treated as binding even as family arrangements, where the doubts existing, as to the rights alledged to be compromised, are not presented to the mind of the interested." *Gibbons vs. Caunt*, 4 Vesey R. 849: *Dunnage vs. Whyte*, 1st Swanst. R. 137: *Henly vs. Cook*, 4 Russ. R. 34.

Therefore, although as we have seen it was held in England as unquestionable doctrine in cases of ordinary contracts, that if a party acting in ignorance of a plain and settled principle of law, is induced to give up a part of his indisputable property to another, a Court of Chancery will relieve him; yet in the case of a compromise of a doubtful right, if the compromise be fairly made in mistake of the law as applicable to that doubt, the compromise is binding. In illustration. If it be doubtful, in the construction of a will, or deed, whether the words "heirs of the body," "issue," "children," be words of limitation, or words of purchase, and a compromise be made, by which either a life estate, or an absolute estate be granted to devisee or vendee, as the fair construction of the will or deed, this compromise shall be binding upon the parties, though the true legal construction of the instrument be different, but this compromise does not affect any right the parties may have from any other

[Trigg vs. Read.]

source, and is only obligatory so far as the construction of the instrument is involved; therefore, though a release may have been executed under this construction, yet if either party have right or title to the property paramount to the will or deed, and is in ignorance of it, this right is not affected by the release. So it is, if the right compromised be doubtful in point of fact, no other fact than that upon which the doubt is supposed to rest, and which is presented for compromise, is precluded by the compromise. As if the party claims as heir at law, and it be doubtful if he be the heir at law, and in case of this doubt he compromise his right; yet if it turn out that, though not heir at law, he is devisee of the property, his right as devisee is not compromised. So if he compromise upon the mistaken apprehension that he is or is not devisee, but it turns out that he is entitled as heir at law, his right as heir at law is not compromised.

In the cases of family compromises, all that need be said here is, that agreements affecting them are upheld with a strong hand, and an equity has been administered in regard to them, which has not been applied to agreements generally, upon the ground, that the honor and peace of families make it just and proper so to do.

Let us now proceed to the application of the principles of law, which we have attempted thus to extract, to the case under consideration.

The defendant purchased from the complainant a tract of land, which was conveyed to him by deed of bargain and sale with general warranty—he enters into possession—he has acquired the complete legal title. But it subsequently appears, that defendant become alarmed in relation thereto, and being much harassed by the position in which he was placed by the conduct of the complainant (which, to say the least of it, is of a suspicious character, and tending to show that he was desirous of forcing the defendant into a rescission of the contract of sale between them, the land having risen greatly in value,) and believing that the complainant had no title to one-half of the land sold to him, he very reluctantly agrees to rescind the contract. In a very short time after this contract of rescission, the com-

69—VOL. V.

[Trigg vs. Read.]

plainant files a bill for a specific performance, setting forth a substantial legal title, and obtained a decree for the same. So that it turns out that at the time the complainant and defendant agreed to rescind their contract, upon the supposed want of title in the complainant, he was not only the legal owner of the one-half, but the clear equitable and legal owner of the other half, which fact was at least unknown to the defendant. This ignorance caused the defendant to make the contract, and which, if it had been removed, he never would have entered into, and which he has refused to execute ever since. Now, is he to be bound by this contract, in "equity and good conscience"?

That this agreement was made in ignorance by the defendant, is not disputed. That it would not have been made but under this ignorance, is manifest.

What is the nature and character of this ignorance? Is it ignorance of law or ignorance of fact? Clearly, in our opinion, ignorance of fact. What fact? The fact, that the complainant was the owner of the moiety of the estate claimed through his brother James.

The defendant was acting upon the mistaken supposition, that there was no written contract between William Trigg and Alanson, Sen., and that no title had passed from William; and in ignorance, that complainant's right thereto had been perfected by the statute of limitations. If there had been a knowledge of the existence of the facts, and the parties had acted upon the belief, that they constituted no obligatory right, either in ignorance that a Court of Chancery would specifically decree the contract against William, or under the belief that the possession was not protected under the statute of limitations, it would have been a mistake of law, and not of fact.

The mistake being one of fact, is it of such a character, as vitiates the agreement in the estimation of a Court of Chancery? Assuredly it is; for it is of the very essence of the agreement; the very cause and foundation of it, and without which it would never have had existence, being in the words of Mr. Story, "essential to its character, and an efficient cause of its concoction."

But this is not all: this ignorance of fact does not appear to

[Trigg vs. Read.]

have been mutual ignorance upon the part of the complainant and defendant. Granting that there was mutual ignorance of the actual existence of the bond at the time, which, it is by no means sure, is not granting too much; yet the complainant must have had reason to believe, that the bond had existence, and had only been lost or mislaid, which information ought to have been communicated to the defendant; and he must also have known of his claim under the will of Alanson Trigg, Sen., and of his seven years possession, which does not appear to have been communicated to the defendant. The withholding the knowledge of these facts, so material to a full comprehension of his rights by the defendant, and so necessary for his proper action upon them, was *mala fides*, such as vitiates a contract.

Can the contract be sustained, as having been made in relation to conflicting and doubtful rights? We think not.

1st. It is not a compromise of conflicting and doubtful rights. Compromises of this character are, where the parties both claim right or title to the property in dispute, and the compromise is made in reference to that right; here there is no such contest, the rights of the parties to the agreement are certain and without conflict; the only doubt and uncertainty being, as to the rights of one of the parties, and a third person.

Whatever title the complainant had, whether in law or equity, it was certain belonged to the defendant. It was equally certain, that if the complainant had no title to the premises sold to the defendant, that he was responsible to him upon his warranty. So the agreement was not to compromise a right, but to rescind a contract, which purported to convey a right which was believed not to exist, and to place the parties in *statu quo*. If an agreement had been made upon the subject, between the defendant and William Trigg's heirs, it would have been a case of compromise of conflicting and doubtful rights, in as much as both parties claimed title to the land.

2d. But if it could be considered as a case of compromise, it was made upon the supposition that there was no title in the complainant, and in entire ignorance of the existence of the

[Trigg vs. Read.]

bond and the adverse possession of seven years, and without relation to these facts.

3d. Important information was in possession of the complainant upon the subject which was withheld. Fraud vitiates a compromise as well as contracts of obligation and sale.

All the remarks heretofore made, are made as if the agreement to rescind had been executed, and for the purpose of showing that a Court of Chancery would under all the circumstances annul and set aside, as having been obtained in bad faith, and sustained in violation of equity.

But much stronger is the case than this: the contract to rescind is executory, and not executed, and the complainant comes asking the aid of the court to enforce it.

The power of a Court of Chancery to execute contracts specifically, is of a very ancient origin, and the principles upon which it is exercised are well understood and settled. It rests upon the ground, that there are many cases in which a compensation in damages will be no adequate remuneration for a violation of contract, and that a failure to perform it is a breach of moral and equitable duty; and a Court of Chancery, addressing itself to the conscience of the offending party, requires a strict performance of what he cannot without manifest wrong or fraud refuse.

Mr. Story in speaking of the power of a Court of Chancery to rescind, cancel, or direct a surrender of contracts, securities or deeds, or to enforce them by a specific performance, sec. 693, Eq. Juris., says: "The application to a Court of Equity for either of the purposes, is not, strictly speaking, a matter of absolute right, upon which the court is bound to pass a final decree, but it is a matter of sound discretion to be exercised by the court, either in granting or in refusing the relief prayed according to its own notion of what is reasonable and proper under all the circumstances of the particular case. Thus for instance: A Court of Chancery will some times refuse to decree a specific performance of an agreement, which it will yet decline to order to be delivered up, cancelled or rescinded. On the other hand a specific performance will be decreed upon the application of one party, when it would be denied upon the ap-

[Trigg vs. Read.]

plication of the other. And an agreement will be rescinded or cancelled upon the application of one party, when the court would decline any interference at the instance of the other. So that we are to understand, that the interference of a Court of Equity is a matter of mere discretion, not, indeed, of arbitrary and capricious discretion, but of sound and reasonable discretion, *secundum arbitrium boni judicis*." 17 Ves. 167: 18 Ves. 335: 16 Ves. 305, 308: 18 Ves. 12: 3 Atkins, 188: 18 Ves. 111. In sec. 762 of the same work, he says: "In truth, the exercise of this whole branch of Equity Jurisprudence, respecting the rescission and specific performance of contracts is not a matter of right in either party, but is a matter of discretion in the court; not, indeed, arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may by general rules and principles, but at the same time which holds or grants relief according to the circumstances of each particular case, when the rules and principles will not furnish any exact measure of justice between the parties." In sec. 750, he says: "Courts of Equity will not proceed to decree a specific performance when the contract is founded in fraud, imposition, mistake, undue advantage, or gross misrepresentation, or when from a change of circumstances or otherwise it would be unconscientious to enforce it. But that as a general rule the contract will be specifically executed, if it be in writing, is certain, is fair in all its parts—is for an adequate consideration, and is capable of being performed; but otherwise not. In sec. 769-70, the same commentator observes: "It is important to take notice of a distinction between the case of a plaintiff seeking a specific performance, and the case of a defendant resisting such performance. We have already seen, that a specific execution of a contract in equity is a matter not of arbitrary right in the party, but of sound discretion in the court. Hence it requires much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance. An agreement to be entitled to be carried into specific performance, ought to be certain, fair and just, in all its parts.

[Trigg vs. Read.]

Courts will not decree a specific performance in cases of fraud or mistake, or of hard and unreasonable bargains, or when the decree would produce injustice, and generally in any case when such decree would be inequitable under all the circumstances. But Courts of Equity do not stop here, for they will let the defendant defend himself by evidence to resist a decree, when the plaintiff would not always be permitted to establish his case by the like evidence. Thus for instance: Courts of Equity will allow the defendant to show, that by fraud, accident, or mistake, the things bought are different from what he intended; or that material terms have been omitted in the agreement; or that there has been a variation of it by parole; or that there has been a parole discharge. The ground of this doctrine is, that Courts of Chancery, "ought not to be active in enforcing claims, which are not under all the circumstances just as between the parties." See the numerous authorities referred to by Mr. Story, page 79, 80, Eq. Juris.

Mr. Story in commenting upon the legal principle, that if one party has actual knowledge of an event or fact from private sources, not then known to the other party from whom he purchases, and which knowledge would materially enhance the value of the thing purchased, or change the intention of the party as to the sale, the contract of the sale will nevertheless be valid, observes: "There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not, and cannot undertake directly to enforce. But when the act of a Court of Chancery is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway. And a purchase made with such reservation of superior knowledge, would be of too sharp a character to be aided and enforced by a Court of Chancery. It is a rule in equity, that all the material facts must be known to both parties to render the agreement fair and just in all its parts; and it is against all the principles of equity, that one party knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a special performance." Story Eq. Juris. sec. 206: 2 Kent Com. sec. 49, p.

[Trigg vs. Read.]

490-1, (2 ed.): *Parker vs. Grant*, 1 John. Ch. Rep. 630: *Ellord vs. Landoff*, 1 B. & Beatt. 230-31.

From this view of the subject, it is obvious that a complainant to be entitled to a specific performance or execution of his contract, must come with his hands perfectly clean, and his conscience entirely void of offence—that if his contract has been obtained for an inadequate consideration—that if it has been made by the defendant in ignorance of his right, either as to the law or the facts—that if it have been made in ignorance of facts, changing the nature of the thing sold, which was known to the opposite party, and by him withheld, whether they were of such a character as he was bound by law to disclose or not, in all these cases a specific performance will be refused, and the party left to his remedy at law if he has any.

These principles are, as we think, conclusive against the complainant's right to relief in the present case.

The defendant involuntarily agrees to rescind a contract by which he had purchased, several years before, the tract of land in dispute; he does this, because he believes the complainant has no title thereto; in this he was clearly mistaken, and there is but too much reason to believe the complainant knew that he was in this mistaken. At any event, in a short time after this agreement, complainant by a decree of a Court of Chancery, procures the title, and this upon a bond that was in existence at the time of the agreement, but unknown to the defendant. The land had appreciated greatly in value between the dates of the purchase and the agreement to rescind. To specifically execute this agreement, will be to benefit the complainant at the expense of the defendant, and without any adequate compensation therefor. There is nothing in the case calculated to make the complainant a favorite in a Court of Chancery, but much to repel him. And to decree in his favor, will be to engraft a new principle upon the law of specific execution of contracts, and to violate principles heretofore considered well settled.

The bill, therefore, so far as it seeks a specific execution of the contract on the part of the defendant will be dismissed, but in as much as a portion of the purchase money is unpaid, and it appears that the evidences thereof have been cancelled, and

[*Bedford vs. The State.*]

that the plaintiff is entitled to the aid of a Court of Chancery under the circumstances to enforce the payment, a decree will be given for the amount due, which shall be a charge upon the land until paid.

BEDFORD vs. THE STATE.

The Supreme Court will not grant a new trial in criminal cases on a mere doubt, such as would justify a jury in rendering a verdict of not guilty: Yet where the evidence is not sufficient to warrant the verdict, the court will grant a new trial, although rashness does not appear.

The plaintiff in error, Maria Bedford, was tried by Judge King, and a jury, in the Criminal Court at Memphis, and found guilty of receiving stolen goods, knowing them to have been stolen, and sentenced to confinement in the penitentiary.

From this judgment she appealed.

H. Barry, for the plaintiff in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The prisoner stands convicted of having received stolen goods, knowing them have been stolen, with intent to defraud the owner. It is insisted the evidence does not establish her guilt, and that this court ought to grant a new trial.

In the case of *Dain vs. The State*, (2 Hump. R. 442,) this court said: "The rule, that this court will not grant a new trial, upon the facts, unless the jury shall appear guilty of great rashness, does not apply to criminal cases." In the case of *Kirby vs. The State*, (3 Hump. R. 304,) the court after commenting upon what is above quoted from the opinion in *Dain's case*, say: "All we mean to say in *Dain's case*, is, that the rule in the strong language in which it is so frequently laid down in civil cases, does not apply, as there stated, to criminal cases."

[Bedford vs. The State.]

Although, therefore, upon a mere doubt, such as would justify a jury in a verdict of not guilty, we would not grant a new trial; yet where the evidence is not sufficient to warrant the verdict, a new trial will be granted in criminal cases, although it may not be such a case of rashness as would induce a like judgment in a civil case.

In the case before the court, the facts are in a narrow compass.

The defendant lived in Memphis, with one William Bellew as his wife, the parties being unmarried. They kept a boarding house, and had boarders. The articles stolen (a leather trunk and some mechanical tools) were found in the house, and under the bed in which Bellew and the defendant slept. The trunk had man's apparel in it, and the tools were in a box, in which also were found some bed clothes, which the defendant claimed. Bellew was apprehended, and while he was at the magistrate's office, a party watched the defendant, to see if she would hide any thing, but she made no attempt to do so. This was all the evidence. Upon this evidence we do not think the conviction of the defendant ought to stand. For how reprehensible soever her mode of life may be, and calculated to create suspicion that she would readily engage in other crimes; yet we ought not to permit her to be punished for such crimes, unless she is proved to be guilty. In this case the proof does not fix on her, knowledge that the goods were stolen. There is nothing from which we can infer that Bellew told her they were stolen; and unless he did so, might not she suppose he had honestly purchased them? The mere fact that they were found in the bed-room of herself and Bellew, is not incompatible with her innocence—the facts proved, must be inconsistent with any other hypothesis than the defendant's guilt. Such is not the case here.

Reverse the judgment, and award a new trial.

IRVINE'S heirs vs. McREE et als.

A Court of Chancery has jurisdiction to award a writ of possession for land where a controversy about the title has been properly brought into the court.

This bill was filed in the Chancery Court at Huntingdon, by the heirs of John Irvine against Andrew McRee, White, Caffry, Tyler and Ballew, for the purpose of divesting them of the title to 303 acres of land.

The ancestor of complainants bought land of Anderson, in the county of Lincoln, and 303 acres of said land being taken by older and better title, certificate warrants were issued therefor in the name of Anderson. McRee purchased a claim of one Orr, and placed the other defendants in possession as tenants.

The case was tried by McCambell, Chancellor, on bill, answer, replication and proof. He divested Anderson of title, but dismissed the bill as to the other defendants, from which decree complainant appealed.

McLanahan and Totten, for complainants.

Bullock, for defendants.

GREEN, J. delivered the opinion of the court.

This bill is filed to obtain the legal title of a three hundred acre tract of land, in Henderson county, and to dispossess the defendants thereof.

It appears from the record, that in 1817, defendant John Anderson conveyed to William Irvine, the ancestor of the complainants, five hundred acres of a twelve hundred acre tract, granted to Nathan Orr, and lying in Lincoln county. This land was claimed by an older and better title, and Irvine surrendered his claim and obtained a duplicate warrant in the name of Anderson, which issued in 1820, was entered in 1821, and granted to Anderson in March, 1824.

This suit was brought in 1838. The defendant, McRee, claims the land by virtue of a purchase from the heirs of Nathan

[Irvine's heirs vs. McRee et aln.]

Orr of all their equity to the twelve hundred acre tract in Lincoln, and the other defendants are purchasers and tenants of McRee. Anderson answers and disclaims any title to the land in controversy. McRee and the other defendants answer and rely on McRee's equity, derived from the heirs of Orr, and upon the statute of limitations.

It is not pretended that the paper, purporting to be a conveyance from the heirs of Orr to McRee is so proved as that it can be read as evidence. There is no certificate of a privy examination of the *feme covert*, as the law requires, and the paper is proved by one witness only. The defendants, therefore, have no equity to the land.

As to the defence of the statute of limitations, the proof is vague and uncertain. McAllister says, "that fifteen years ago a man named Taylor took a lease from McRee, and lived on the land; and about the year 1828, S. F. White took a lease and lived on the land some time, and then sold his interest to Garland Anderson, who retained possession until the lease was out; after which White and others bought from McRee, and have continued in possession until now." This is all the evidence as to the possession; and this is far short of proof, clear and satisfactory, of an adverse continued possession for more than seven years.

The facts stated by the witness may be true, and yet neither Taylor, White nor Anderson may have continued in possession until the time the purchase was made from McRee. And when that purchase was made (from which time there has been a continued possession) the witness does not state. When a party relies upon his possession only, to resist the right of the true owner of land, he must show by clear proof, his actual occupancy, continued, uninterrupted and adverse for the time required by the statute of limitations. Adams on Ejectment, 485, *et seq.*

The other defendants have no right to insist that a decree cannot be had against Anderson, divesting him of the legal title, on the ground, that the suit was not brought in seven years after the warrant issued in his name. He does not plead the statute of limitations, and they do not claim under him, nor are they

[Irvine's heirs vs. McRee et aln.]

any way connected with his title. Besides, Anderson has never claimed adversely to Irvine's heirs; Irvine himself procured the warrant to issue in Anderson's name, and Anderson has never set up any claim to the land.

But it is insisted, that although the complainants may be entitled to a decree, vesting in them the legal title; and although the defendants in possession have no title to the land, yet that a Court of Equity has no jurisdiction to award a writ of possession against them. We do not concur in this view of the case. These defendants attempt to set up an equity against the complainants connecting themselves with the title of Nathan Orr, under which the complainants also claim. They were, therefore, properly made parties to this suit, that the conflicting equities might be settled by the adjudication of the court. And having decided that the complainants have the better equity; and that consequently the defendants have no right to the land; we are at a loss to see upon what principle it can be assumed, that the jurisdiction of the court stops here, and that it is prevented from making a decree according to the rights of the parties. That a Court of Chancery has jurisdiction to decree possession of land, when a controversy about the title has been properly brought into that court, is unquestionable. 4 Kent Com. 184: 4 John. Ch. R. 609. And we have seen that here a controversy between the complainant and McRee was properly brought into this court. The legal title was in Anderson, but he did not set up any right to the land. The complainants claim to be entitled in equity, and so do the defendants. His Honor the Chancellor determined that the complainants were entitled to the land, but yet supposed he had no jurisdiction to afford them relief. We think that in this he erred.

Let the decree be reversed and decree for the complainants, and that they be put in possession of the disputed premises.

HARDAWAY vs. CHAIRMAN CO. COURT.

A judgment against a Tax Collector need not recite, that it appeared to the court, that the tax list came to the hands of such collector.

The judgment which was rendered in this case, on motion, in the Circuit Court of Shelby county, by W. H. Loving, Special Judge, was as follows:

"This day comes James Jamison, Trustee of the County Court of the county Shelby, and John Caruthers, Attorney General for the 11th Judicial Circuit Court, and move the court for a judgment in the name of the Chairman of the County Court against Lemuel P. Hardaway, Sheriff and Collector of the County Taxes, of the county of Shelby, for the year 1843, and his securities, A. T. Bledsoe, and James H. Lawrence, and it appearing to the satisfaction of the court, that said Hardway, sheriff and collector as aforesaid, has failed to pay over to James Jamison, trustee as aforesaid, on the last day of December, 1843, the sum of two thousand three hundred and seventy dollars, the balance of the revenue of Shelby county, for the said year 1843, and the bond of the Sheriff being produced in open court for the faithful collection and paying over of the revenue of the county of Shelby aforesaid, in the year 1843, by which it appears that said A. H. Bledsoe and J. H. Lawrence are his securities.

"It is therefore considered by the court, that John W. Freeman, Chairman of the County Court of Shelby county, recover a judgment against Lemuel P. Hardaway, Sheriff, A. T. Bledsoe and James H. Lawrence, his securities, the sum of two thousand three hundred and seventy dollars, the amount of the taxes during the year 1843, which the Sheriff has failed to pay over to the Trustee of the county Shelby, as by law he was bound to do, together with twelve and one-half per centum damages thereupon."

From this judgment the defendants prayed an appeal in the nature of a writ of error.

Daniel, for the plaintiffs in error.

Attorney General, for the State.

[Hardaway vs. Chairman Co. Court.]

REESE, J. delivered the opinion of the court.

The defendant in error obtained a judgment, on motion, against the plaintiff in error and his sureties, for the failure of the former in collecting and paying over the county taxes for the county of Shelby. There is no bill of exceptions in the case; and the objection to the judgment here is, that the court, on the face of the judgment, does not assume the existence of a state of facts as made to appear in the case, which will legally sustain the exercise of its jurisdiction. The principal specification under this general objection is, that the judgment does not state it to have appeared to the court, that the tax lists were placed in the hands of the Collector by the Clerk. It may be stated at the threshold, that it is believed that in the many judgments against Collectors, which by this court have been held good, not one, perhaps, sustained the assumption of such fact as necessary to be made to appear, and we would reluctantly yield to any new ground on which to arrest the efforts of the public in holding to a just responsibility defaulting officers. But it is said, the question may have passed *sub silentio*. Let us then consider this objection.

The argument in its favor is, that in cases of individuals, when moving against Sheriffs for not paying over money collected on process, or for the non-return of process, &c. it must be shown that the execution was placed in the hands of the Sheriff; and that the tax list confers on him the same power, and is as necessary to its exercise, as a *fi. fa*. In answer to this, we say, first, that in the case of a *feri facias* the duty of a Sheriff is passive; it is not his business to sue out process, or to call for it. It is not the official duty of the Clerk to place it in his hands. That is the business of the plaintiff in the execution. When the Sheriff gets the process in his hands, his duty and responsibility commence. But it is otherwise with these tax lists; it is his active official duty to collect the taxes, and pay them over, and to take all necessary and proper means to that end. To the performance of this duty he is specifically sworn by the provisions of the 2d sec. of the act of 1835, ch. 15. Moreover it is the official duty of the Clerk to make out

[Carr vs. Stevenson.]

the tax lists against a given time. This legal requisition it is to be presumed and intended the Clerk will perform. This general answer to the objection we think would be sufficient. But there is a still more specific answer. It is provided in the act of 1833, ch. 86, sec. 2, "that when the Clerk shall have failed or refused to furnish the tax lists to the Sheriff, as directed by law, upon satisfactory proof of that fact being made appear to the Treasurer or County Trustee, they shall suspend taking judgment against said Sheriff and Collector, until a reasonable time after the reception of said list shall enable him to collect said tax." Of course if no such proof be made, it is to be taken for granted that the tax lists have been made out. The strong implication from this provision is, that upon the motion nothing on this subject need be shown affirmatively by the Treasurer or Trustee.

Upon both grounds, therefore, we are of opinion that the objection is not well taken, and we affirm the judgment of the Circuit Court.

CARR vs. STEVENSON.

1. Where pleas in short are filed; if the defendant's chooses to treat them as valid, the court will so regard them.
2. Where the verdict responds to one only of the pleas filed, it will be set aside.
3. Where the language of the verdict is ambiguous, it is the duty of the court to give it such construction as will make it effective; *ut res magis valeat quam pereat*.

This is an action of debt, which was tried by J. C. Humphreys, Special Judge, and a jury of Shelby county, at the February term, 1845, of the Circuit Court held for said county. A verdict and judgment rendered in favor of plaintiff, Stevenson. Carr appealed.

V. D. Barry, for the plaintiff in error.

Brinckley, for the defendant in error.

[Carr vs. Stevenson.]

REESE, J. delivered the opinion of the court.

This is an action of debt. The defendant pleaded in short two pleas, payment and set-off. And plaintiff replied in short to both, electing to treat them as valid and effective pleas.

The jury were sworn to try the issues, and they make a specific response in their verdict to one of the pleas only—that of payment—in language, whose meaning and legal effect, is appropriate to one of the issues only, omitting to take any notice whatever of the plea of set-off. This is error not the less, that the pleas and replications were in short. The plaintiff might have treated those pleas as something or nothing; but when he chooses to treat them as something, that is, as valid and effective, the court too must treat them as something, and cannot at his instance hold them to be nothing.

This precise point is decided in the case of *Crutcher vs. Williams*, 4th Humphreys, in opposition to what is said in 4th Yer. 565. We adhere to the first named case.

There was a case last winter at Nashville, in which the pleas were gaming and payment, and the verdict responded in language not technically appropriate to either plea, although in substantial meaning and legal effect contradicting both; namely, that the defendant did owe the debt sued for.

We felt it to be our duty, to so mould the verdict as to make it sensible and effective if possible. The jury overlooked the terms of both pleas; replied to neither in their verdict, in appropriate language, and the verdict was indeed a nullity, or in legal effect an answer to both pleas. We felt it our duty to give, and were at liberty to give, a construction to the verdict that would make it effective; *ut res magis valeat quam pereat*. But here the verdict is legally and technically a response to one of the pleas; in substance it applies to one of the pleas; there is nothing in it applicable to the other, the other is altogether overlooked.

For this reason the verdict and judgment must be set aside, and a new *venire* be awarded.

QUARLES *v.* THE STATE.

1. Betting upon the result of the Presidential election in the United States, is within the letter and meaning of the act of 1823, ch. 25, sec. 2, and indictable.
2. In order to constitute a wager, there must be a risk by both parties.

The plaintiff in error was indicted for betting on the result of the Presidential election in 1844. He was tried by Judge King, and a jury, in the Criminal Court at Memphis, convicted, and sentenced to pay a fine of ten dollars. He appealed.

V. D. Barry, for plaintiff in error.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

The plaintiff in error was presented for a bet and wager on the result of the Presidential election. The testimony on the trial was, that pending that election, and before it took place, the plaintiff in error and one David M. Pool were conversing on the chances of success of the two candidates, Henry Clay and James K. Polk, and they disagreeing as to such chances, plaintiff sold and delivered to said David M. Pool goods and merchandize for one hundred and seventy dollars, to be paid for when Henry Clay should be elected President of the United States.

The court charged the jury, that if they believed the above facts, they should find the plaintiff in error guilty, as charged in the presentment. He was found guilty, and the court refused a new trial.

For the defendant below it is objected: 1st. That our statute does not embrace the case of a Presidential election, the words of the statute being "upon any election or elections in this State." We are of opinion, that the objection is not well taken. The Presidential election is an election in this State, within the words of the statute; and the fact that the result depends, not upon the exclusive action of this State, but upon the joint action of many States, does not take the case out of the words of the

[*Coleman vs. Sanderlin.*]

statute. The offence is also within the meaning and object of the statute, which was to preserve the freedom and purity of elections, and to exclude from them the operation of motives not founded on, but adverse to, the public good. But there is no testimony in the case, that the goods delivered were sold at a price above their value. The purchasing party, therefore, staked nothing. If he lost, he was to pay for the goods, their value; if he won, he was to pay nothing. He, therefore, staked nothing, risked nothing. The risk was all on one side, and was not a betting or wager; although the contract, as being against public policy and public morality, was void. If the goods were assessed above their value, in market, there was a wager, and the defendant ought to have been convicted.

Upon the ground that there was no proof of this sort, the judgment of the Circuit Court must be reversed, and a new trial be had in the case.

COLEMAN vs. SANDERLIN.

Where a bond for title to real estate was executed, and a bill single executed for the consideration, the defence of a want of title to the land sold, could not be set up against the bill single by the vendee: *A fortiori*, could not such vendee discharge the bill single, and recover back the money paid by action of assumpsit. The remedy is on the bond for title.

This is an action of assumpsit, which on the plea of non-assumpsit was referred to a jury at the February term, of the Circuit Court held for the county of Shelby, in 1845, J. C. Humpheys, Special Judge, presiding. A verdict and judgment were rendered for the plaintiff, from which the defendant appealed.

V. D. Barry, for the plaintiff in error.

Daniel, for the defendant in error.

[Coleman vs. Sanderlin.]

TURLEY, J. delivered the opinion of the court.

Daniel Coleman, on the 13th day of November, 1840, sold to Malachi Sanderlin, a tract of land, for the consideration of four hundred dollars, for which Sanderlin executed his bill single, due on the 1st of January, 1842. Coleman executed his bond to Sanderlin in the penalty of twenty-four hundred dollars, binding himself to convey the land upon payment of the consideration. After this transaction, and before Sanderlin's bill single fell due, Coleman transferred it. Sanderlin has paid it, and brings this action of assumpsit to recover it back, upon the alledged ground, that the title to the land has not been conveyed to him, and that Coleman has it not to convey.

The only question that need be considered is, whether under these circumstances the action can be maintained. And we think it cannot; but the remedy is on the bond. Sanderlin by executing his note under seal, specifying a day of payment, has fixed his liability therefor at law, and could not defend himself except in equity against its payment, upon the alledged ground of want of title to the land covenanted to be conveyed by Coleman. Not being able to defend himself at law, it would be a strange anomaly to hold, that he might pay the money, and then bring an action of assumpsit to recover it back; thereby doing that indirectly, which the law prohibited him from doing directly.

The court below, not having taken our view of the case, gave judgment against the defendant, which must be reversed, and the case remanded for a new trial.

FLEMING vs. THE STATE.

It is competent to discredit a witness, by proving that he was drunk at the time the transaction he attempts to relate took place. The large quantity of liquor drank is a circumstance tending to prove drunkenness, and as such, is competent evidence to prove that fact.

The plaintiff in error, Fleming, was tried by King, and a jury, in the Criminal Court at Memphis, for the offence of robbery, and convicted. He appealed.

H. G. Smith, for the plaintiff in error.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

This is an indictment for robbery. The question of guilt rests mainly upon the testimony of the prosecutor. That testimony is distinct and explicit, and if to be depended on, leaves no doubt of the guilt of the prisoner. The defence was rested on the state of mind of the prosecutor at the time of the transaction, as affecting the accuracy of his narrative and his trustworthiness. The effort was to prove him drunk at the time. He stated in his examination in chief, that he and his companions, at the cotton gin in the neighborhood of Memphis, drained the jug dry, and that he drank two or three times with the prisoner on the wharf-boat, before the robbery. On cross-examination he was asked, "how many drinks of liquor did you take from the time you left the cotton gin till you arrived at Memphis?" Witness answered: "I did not drink a drop." Defendant's counsel asked of a witness called by him, if the prosecutor did not on the evening of the alledged robbery, and at a short distance before he reached Memphis, drink a pint of brandy. The Attorney for the prosecution objected to the question, and the court would not suffer it to be answered. The defendant's counsel then asked the witness; how many drinks did the prosecutor take between the cotton gin and Memphis? which was also objected to, and the objection sustained by the court. But the court gave leave to prove that prosecutor was drunk.

[*Bryan vs. Martin ex'r.*]

We think the court erred in rejecting the testimony, on two grounds. First, to show the state of mind of the prosecutor. The quantity drank, it is true, will not *per se* prove drunkenness, because the operation of ardent spirits is very different on different constitutions; but notwithstanding dicta to that effect, we cannot perceive, in reason, why the quantity drank should be deemed irrelevant or incompetent, as a circumstance, to prove the probable state of mind. In the second place, the evidence was competent to contradict and discredit the witness, who had stated that he had not drank a drop between the cotton gin and Memphis. It was competent to do this as well in relation to drunkenness, as to any other matter.

Perhaps these questions affect but little the merits of the cause. But we cannot help that, and are constrained to reverse the judgment, and grant a new trial.

BRYAN vs. MARTIN, *ex'r.*

An agreement by indenture was made by an administrator and the widow of intestate, by which the administrator relinquished title to certain slaves to the widow, upon consideration, that she relinquished her interest in the balance of the estate. Held, that this was not a distribution, but a sale of the slaves, which was void under the act of 1827, ch. 61.

This cause was tried by Chancellor McCambell, on bill, answer, replication and proof, at the May term, 1844, of the Chancery Court at Sommerville, and a decree for a perpetual injunction entered against the defendant. The defendant appealed.

H. G. Smith, for the complainants.

J. J. Potts, for the defendants.

TURLEY, J. delivered the opinion of the court.

John D. Martin, executor of Samuel Dickins, recovered judgment against Jesse Isler, administrator of Joseph H. Bryan,

[Bryan vs. Martin ex'x.]

and caused his execution thereon to be levied upon certain negroes of the estate of said Joseph at the time of his death, and which came to the hands of the administrator to be administered.

Sally Ann Bryan, the complainant, and relict of said Joseph, files this her bill, to enjoin the sale of said slaves, alledging as cause therefor, that after the death of the said Joseph, the said Jesse Isler, his administrator, and herself entered mutually into a contract by indenture, by which it was agreed between them, that the said Jesse Isler released and for ever quitclaim to the said Sally Ann all title, claim and demand he had to said negroes, and in consideration thereof, she bargained and sold to him, his heirs and assigns forever, all her interest in the estate of her deceased husband. And the question now is, whether this contract is obligatory as to the creditors of the said Joseph H. Bryan, and frees the negroes in controversy from the execution of the defendant. It is argued that this contract is a distribution so far as the negroes are concerned; that it vests the legal title to them in Sally Ann Bryan, and that they have ceased to be assets in the hands of the administrator, for the satisfaction of debts. Such is not our opinion. This is no distribution, but a contract of sale on the part of the administrator, supported by the consideration of the relinquishment, on the part of Sally Ann Bryan, of all interest in her deceased husband's estate to him.

This sale on the part of the administrator is void under the provisions of the act of 1827, ch. 61, which avoids all sales of slaves by executors or administrators, unless they be made upon the order of the Circuit or Chancery Court, upon petition filed for that purpose. This extends to the protection of legatees, distributees and creditors.

The sale then being void, the execution was properly levied, and the bill must be dismissed.

BELLEW vs. THE STATE.

The Supreme Court will not reverse the judgment of the Circuit Court, on the ground of a refusal to continue, unless in case of palpable mistake, without the correction of which, injustice must necessarily be done.

Bellew was indicted in the Criminal Court, at Memphis, on the 27th day of February, 1845, for the offence of receiving stolen goods, knowing them to have been stolen, and with the intention to deprive the owner of them.

The case was called on the 28th, and the defendant moved the court for a continuance of the case. He grounded his motion on an affidavit, which set forth, that A. Whipple was a material witness for him—that he could not go to trial safely without his testimony—that he could prove by said witness that affiant purchased the articles enumerated in the indictment—that said witness has not been subpoenaed, for the reason, that affiant has been in close confinement ever since his arrest, and for the further reason, that affiant believes that said witness, Whipple, had left the State of Tennessee before the arrest of defendant, thereby rendering it impossible for him to be served with process—that said witness was absent without the procurement or consent of affiant—that he knew of no other person by whom he could prove the same facts—that he expected to have the benefit of his testimony at the next term of the court, and that the application was for the purpose of obtaining justice, and not delay merely.

The presiding Judge, King, refused the continuance on this affidavit, and the defendant thereupon, was tried, convicted, and sentenced to confinement in the penitentiary of the State for the term of five years.

He appealed from this judgment of the court.

H. Barry, for plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

The prisoner was convicted in the Criminal Court at Mem-

[Bellew vs. The State.]

phis, of the offence of receiving stolen goods, knowing them to have been stolen, and now asks a reversal of the judgment pronounced against him, and a new trial upon the ground, that a continuance, which he prayed for at the time he was put upon his trial, was improperly refused him.

We have repeatedly said, that we interfere with the judgments of the inferior courts with reluctance upon matters of practice, or things involving an exercise of legal discretion, and that we will never do so, except in cases of palpable mistake, without the correction of which, injustice must necessarily be done.

In the case now under consideration, the prisoner filed an affidavit as the ground for his motion for a continuance, which alleges, that one Alfred Whipple is a material witness in his case, without whose testimony he cannot go safely to trial; that he can prove by him that the articles charged to have been stolen, and to have been feloniously received by him, were purchased. The Criminal Judge refused to continue the case upon this affidavit. In so doing has he committed such a mistake in the exercise of his discretion as must be productive of injustice to the prisoner if it be not rectified? We cannot say that he has. The affidavit is very loose and general in its expressions; it was not stated from whom the articles were purchased, nor the price paid for them. Every word contained in it may be true, and still the prisoner be guilty. Receivers of stolen goods often, in point of fact most generally, pay some consideration, inadequate of course, to the thief, who will very seldom, if ever, steal for the purpose of giving to another. The wording of the affidavit induces the impression that the affiant was paltering with the facts, by stating, as a cause for a continuance, what might be true in word, but false to the sense.

We, therefore, think the Judge committed no error in refusing a continuance, and affirm the judgment.

TAYLOR vs. HUNTER & SEARCY.

1. Where real estate is sold and conveyed, the vendor has a lien on the land for the payment of the purchase money, whilst it remains in the hands of the vendee or his assignee with notice of the lien.
2. A Court of Chancery has no power to restrain the purchaser of real estate from selling it without announcing the existence of the lien. It can do nothing in the premises except order a sale of it in the hands of vendee or assignee with notice, for the satisfaction of the purchase money.

This is a bill in Chancery, which was filed in the Chancery Court at Somerville, by Taylor against Hunter & Searcy.

It was tried on bill, answers, replication and proof, by Chancellor McCambell, at the November term, 1844. He decreed in favor of complainant, and defendant appealed.

D. Fentress, for complainant.

Searcy, for defendants.

REESE, J. delivered the opinion of the court.

Complainant sold to defendant, Hunter, real estate, and conveyed to him the same by deed of bargain and sale. The sale was on a credit of one, two, three and four years, and no other security taken for the price or purchase money, than the bonds or bills single of the vendee. The first two instalments were paid, and the last two not due, when the defendant Hunter, the vendee, contracted to sell and convey the real estate purchased of the complainant to the other defendant Searcy. Under these circumstances this bill was filed to assert and set up the vendor's lien for the unpaid purchase money which was not due. It is a case, where it is clear that, as between vendor and vendee, the lien existed, and the defendant Searcy acknowledges that at the time of the purchase from Hunter, he knew that a portion of the purchase money was unpaid to complainant; moreover, at the time of the bill filed, Searcy had not paid to Hunter the price stipulated to be paid to him for the land, nor had he received and accepted from him a deed for the land. So far the matter is very clear.

[*Taylor vs. Hunter & Searcy.*]

But what was the use of the bill? Nothing being due to the complainant at the time, the land could not be subjected to the satisfaction of his lien. As to the notice which the allegations of the bill would give to Searcy of the nature and extent of complainant's right or claim, that could as well have been done orally, or in any other manner, so far as it was necessary.

The nature of the lien existing between vendor and vendee, cannot be, and ought not to be changed in nature or extent by judicial declaration and injunction in chancery, uncoupled with a sale of the premises for the satisfaction of the lien. The order that the complainant has obtained from the Chancellor upon the defendants, that they shall not sell the land without telling the purchaser that the complainant's lien exists, is unsustainable, we imagine, by principle or precedent. Suppose he does sell without such announcement, does Searcy become debtor to the complainant instead of the land? Or shall he be merely proceeded against as for a contempt? The effort is to create a new species of judicial mortgage. This cannot be done. It is incident to the nature of this lien, that the vendor may lose it by a fair sale and conveyance on the part of the vendee to a third person having no notice of its existence. It is the vendee's business, if he apprehends such a contingency, to withhold the title, or take a mortgage, or personal security, or make the existence of his right notorious. But to attain his purpose in the manner attempted in this bill, would be to change the nature and extent of the right.

The bill must be dismissed with costs.

RICHMOND vs. WAGNON.

A replication to a plea of usury, by the act of 1835, ch. 50, must deny the existence of usury altogether in the transaction, or it must state specially the contract.

This case was tried on demurrer by W. C. Dunlap, presiding Judge, at the February term, of the Circuit Court held for the county of Shelby, in 1845. The demurrer to the plaintiff's replication was sustained, and judgment rendered in favor of the defendant, from which the plaintiff appealed.

E. Yerger and Barry, for plaintiff.

W. T. Brown, for the defendant.

GREEN, J. delivered the opinion of the court.

This is an action of debt at the suit of the plaintiff in error, on a bill single for two hundred and fifty dollars.

The defendant pleaded on oath, "that the writing obligatory, mentioned in the declaration, was made and delivered upon an agreement, that the plaintiff would advance to the defendant one hundred and twenty-five dollars—and that defendant would give the plaintiff one hundred per cent. for the forbearance thereof three months, making the further sum of one hundred and twenty-five dollars, which exceeds the rate of six per cent. interest, and is unlawful—and that the said writing obligatory was executed for the consideration of the said sum of one hundred and twenty-five dollars only, advanced as aforesaid, and the said sum of one hundred and twenty-five dollars, so unlawfully agreed to be paid for the forbearance thereof, and for no other consideration."

To this plea the plaintiff replied on oath, "that the said writing obligatory, in the declaration mentioned, was made by said defendant for a good and legal consideration, and not in pursuance of, or upon the corrupt and unlawful agreement, or for the purpose in said plea of said defendant mentioned."

To this replication the defendant demurred. The court sustained the demurrer, and gave judgment for the sum due, as stated in the plea. The plaintiff appealed to this court.

[Richmond vs. Wagnon.]

It is now insisted, that this replication, upon general principles, is well pleaded; and in this, we think the plaintiff is correct. But the question presented in this case does not arise upon general principles of pleading, nor can it be settled upon the authorities in reference thereto. A proper construction of our statute, under which this plea was filed, must govern the case.

By the act of 1835, ch. 50, sec. 4 and 5, it is provided, that when a greater sum than six per cent. per annum is reserved, and suit is brought for the same, the defendant may avoid the excess over legal interest, by a plea on oath, setting forth the amount of usury in the transaction. To such plea the plaintiff may reply on oath, and the fact shall be decided by a jury, where it is denied in the replication. Where the plaintiff admits the truth of the plea in his replication, or fails to file such replication with the affidavits required, judgment shall be given for the plaintiff for the principal and legal interest, and no more.

The act further provides, that when the plaintiff is an endorsee, or executor, or administrator, he shall be permitted to file his replication, by swearing that there was no usury in the transaction, to his knowledge.

This act clearly contemplates that the plaintiff must in his replication deny that there was any usury in the transaction; or if he deny the special contract stated in plea, but do not deny the existence of usury to some extent, he must state in his replication the contract as it exists. It is not sufficient to confine his denial to the agreement as set forth in the plea and then stop. He must deny the existence of usury altogether, or he must state specially the contract. This replication does neither of these things, and the demurrer was, therefore, properly sustained.

Affirm the judgment.

KNOX vs. THOMAS.

1. Upon the passage of the act of Congress relinquishing to the State of Tennessee the title to the unappropriated lands in the Western District of Tennessee, the occupant laws previously enacted vested those who had complied with such laws rights which constitute a valid consideration for a contract.
2. Where defendant obtained possession of land by virtue of a contract with the plaintiff, he cannot hold in hostility to him and claim a right of occupancy in himself.

This is an action of ejectment instituted in the Circuit Court of Fayette county, by Thomas against Knox. It was tried at the May term, 1843, by Judge Dunlap and a jury. A verdict and judgment were rendered in favor of the plaintiff; from which the defendant appealed.

H. G. Smith, for plaintiff in error.

Scruggs, for the defendant in error.

GREEN, J. delivered the opinion of the court.

On the trial of this cause, the plaintiff read a grant to himself for forty acres, dated 9th of June, 1842, by virtue of an entry made the 9th of May, 1842, founded on a warrant, and also a grant for one hundred and sixty acres, dated 20th December, 1842, by virtue of an entry dated 16th July, 1842, founded on the payment of twelve and one half cents an acre, by virtue of the act of the 11th January, 1842. He proved that the defendant was in possession of part of the land covered by each grant, at the time the suit was brought.

The defendant read an agreement between himself and the plaintiff, dated 28th November, 1841, by which the plaintiff sold the defendant seventy-five acres of land out of the south-east corner of an occupant piece of land in the name of John Gordon, at four dollars and fifty cents per acre. This seventy-five acres is part of the land in controversy. The plaintiff proved that the defendant went into possession under the above contract; but afterwards refused to claim or hold under the plaintiff, and was notified by the plaintiff to give up possession, which he refused to do.

[Knox vs. Thomas.]

The defendant offered to prove that the plaintiff was not entitled to a right of occupancy of the land, but that he (the defendant) went into possession of the same early in January, 1842, and made improvements thereon, and that he was in possession, and entitled to a right of occupancy at the date of the plaintiff's entries; which evidence the court rejected, and a verdict was rendered for the plaintiff.

It is insisted that the evidence offered by the defendant was improperly rejected, because by several acts of assembly an entry and grant of land held, at the time, by another, by right of occupancy, shall be null and void.

We think these acts have no application to this case. The defendant shows that he went into possession of the lands under a contract with the lessor of the plaintiff for seventy-five acres, by virtue of a right of occupancy in the name of John Gordon. Having so entered, he could not hold in hostility to the plaintiff, and claim a right of occupancy for himself. *Meadows vs. Hopkins*, Meigs' Rep.

But it is said, these claims to a right of occupancy have been held by this court to confer no right, and to form no consideration for a contract, and therefore such contract could create no estoppel.

The decisions referred to were made before the Congress of the United States relinquished those lands to the State of Tennessee. Then, Tennessee had no right to the soil in the vacant land in this District, and of course could by its laws confer none upon the occupant. Hence this court held, in the case of *Edwards vs. Batts*, (5 Yerg. R. 441,) that a contract in reference to these lands could not be recognized as having any validity. And this decision is put expressly upon the ground that Tennessee had no right to the land, and could confer none; and therefore a contract in reference thereto was without consideration. But as these lands were relinquished by Congress to this State before the contract between these parties was entered into, the case is very much altered. So soon as this relinquishment was made and Tennessee became vested with the title, the occupant laws previously enacted conferred upon those who had complied with their provisions rights to the lands so pos-

[Bracken vs. Chaffin.]

sessed, which might constitute a consideration for a contract. 2nd. The defendant moved the court to strike from the costs taxed against him the costs of two witnesses who were not examined by the plaintiff. This the court refused to do; it appearing from the subpoenas, that the defendant had summoned witnesses who were not examined. In this we think there is no error. The defendant did not examine all his witnesses; and for aught the court could know, the plaintiff's witnesses who were not examined were summoned to rebut that which he supposed the said witnesses of the defendant might depose. No inference could be drawn therefore, that they were summoned merely to swell the costs, and oppress the defendant.

Affirm the judgment.

BRACKEN vs. CHAFFIN.

Complainant claimed a slave which was levied on as the property of a third person. He consented to let the slave be sold on condition that if defendant purchased him he should have the right to take the slave by paying the money bid by defendant. It is held that this agreement did not amount to a mortgage.

This bill was filed in the Chancery Court at Sommerville by Bracken against Chaffin. It was tried by Chancellor McCambell, on bill, answer, replication and proof, at the November term, 1843.

He dismissed the bill, and complainant appealed.

Smith and Searcy, for complainants.

Humphreys and Coe, for defendants.

REESE, J. delivered the opinion of the court.

The only question in this case is, whether what was said and done between the complainant and defendant, touching the slave in the pleading mentioned, constitutes the transaction a mortgage

[Bracken vs. Chaffin.]

of the slave. Defendant had an execution against A. Looney, the father-in-law of the complainant, which he caused to be levied upon the slave: the slave at the time was claimed by the complainant, who consented that the slave might be levied on and sold; and defendant promised that if he became the purchaser, he would take the amount he might bid for the slave at the sale, from the complainant, and let him have the slave. The slave was sold, and the defendant became the purchaser and has since sold the slave to a third person; and the complainant has filed this bill to redeem, treating the transaction as a mortgage. We are of opinion that it is destitute of every attribute of a mortgage. There was no loan of money from complainant to defendant; there was no precedent debt, nor any relation of creditor and debtor between them. Defendant has no covenant upon complainant, nor any means to coerce his payment of the money. The debt of defendant against Looney was satisfied and extinguished to the extent of defendant's bid. If the slave had died after the sale, it would not have revived the claim against Looney nor given the defendant any remedy for the value against complainant. The loss would have fallen upon defendant. But whether the transaction constituted a valid agreement to permit complainant to purchase the slave from the defendant, it is not material to enquire. There was no offer to purchase, and this bill is not filed upon that footing, but to redeem a mortgage. Let the bill be dismissed with costs.

GIFT vs. ANDERSON.

If personal property be sold by the sheriff or other officer without such property being present at the time and place of sale, the sale is void, unless the execution debtor shall waive the necessity of its presence.

Greenlow recovered a judgment against Gift. A *fi. fa.* was issued and levied on some slaves, the property of Gift, by the sheriff of Shelby county. The officer took a bond from Gift for the delivery of the slaves. A portion of the slaves were delivered and the one in controversy was not delivered, but Gift requested the officer to sell her without her presence. The sheriff did sell her accordingly, and Anderson became the purchaser, and the slave came to his possession.

Gift instituted this action of trover against Anderson to recover the value of the slave. The defendant pleaded not guilty, and the case, upon the above facts, was submitted to a jury in the Circuit Court of Shelby county, W. H. Loving, Special Judge, presiding. It was insisted, on the part of the plaintiff, that the sale was void, the slave not being present at the time and place of sale. But the presiding Judge was of a different opinion, and charged the jury that the general rule of law in reference to sales of personal property by sheriffs was that the sale was void, if the property was not present and exhibited to the bidders, but this was a right secured to the execution debtors, which they might waive if they choose, and if the proof satisfied them that the sheriff was requested by the defendant to sell the slave without her presence, the sale was valid.

The jury returned a verdict for the defendant; from which the plaintiff appealed.

Daniel, for the plaintiff.

V. D. Barry, for the defendant.

TURLEY, J. delivered the opinion of the court.

The only question presented in this case is, whether if the defendant in an execution agree that a sale of his personal ef-

[Blake vs. Dunn et al.]

fects may be made, without their being present at the sale, and such sale be made, the vendee obtains the legal title thereto.

The facts of the case are these: An execution had been issued against the plaintiff in error and was levied upon a negro child of infantine age, and he authorized the sheriff to expose the same to public sale without it. It was purchased by the defendant, who in some short time thereafter reduced it to possession, upon which this action of trover was brought. Plaintiff having lost the case in the Circuit Court, has prosecuted his appeal in the nature of a writ of error to this. Upon the whole view of the case, we are satisfied there is no error in the judgment below. For though it be unquestionable as a general rule, that personal property cannot be sold under process by a sheriff or other officer, without its actual presence at the time of the sale, yet it is equally true that this restriction is intended for the benefit merely of the owner; and if he agree that it may be done otherwise, he is not injured, and has no cause of complaint.

Judgment affirmed.

BLAKE vs. DUNN *et al.*

The act of 1801, ch. 6, sec. 64, which makes the obtaining a writ of injunction against a judgment operate as a release of errors at law, does not prohibit the correction of a mistake made by the clerk in entering up the judgment of the court.

Dunn and Henderson were the administrators of Scales, deceased, and were sued in debt in the Circuit Court of Shelby county as administrators, by Blake, at the January term, 1838: a judgment was rendered against them for the sum of nine hundred dollars as administrators, but the clerk by mistake entered up a judgment against them individually for that amount.

The defendants filed a bill in the Chancery Court to obtain relief against this judgment; but the bill was dismissed for the want of jurisdiction of the subject matter by a court of chancery.

[Blake vs. Dunn et al.]

At the June term, 1844, of the Circuit Court, Dunlap, the presiding Judge, on the motion of the defendants quashed the execution which had issued to be levied *de bonis propriis*, and corrected the mistake, and judgment was entered against them as administrators, to be levied of the goods of the intestate in their hands to be administered.

From this judgment the plaintiff appealed.

V. D. Barry, for Blake.

W. T. Brown, for Dunn.

GREEN, J. delivered the opinion of the court.

A suit was brought by the plaintiff in error against the defendants, as administrators of Constant Scales, deceased, upon a writing obligatory executed by their intestate in his lifetime. A judgment by default was taken, and the clerk by mistake entered the judgment against Dudley Dunn and Littleton Henderson personally. An execution issued against them to be levied *de bonis propriis*. They filed a bill and obtained an injunction; but the injunction was dissolved and the bill dismissed for want of jurisdiction. A motion was then made in the court in which the judgment was rendered, at a subsequent term, to correct the mistake in entering up the judgment, so as to direct that it be against the defendants in their representative character, to be levied of the goods of their intestate in their hands to be administered. This motion was sustained, and the correction was made, upon which judgment the plaintiff appealed to this court.

It is not questioned but that a court of record can, at a subsequent term, correct any clerical error that may have intervened in its proceedings; nor is it contended that the judgment in this case was not a mistake of the clerk, which falls within the rule. But it is insisted that this correction cannot be made because the defendants obtained an injunction in this cause, which, under the act of 1801, chap. 6, sec. 64, is a release of errors.

[Blake vs. Dunn et al.]

That act provides, that "a judgment on confession at law, or filing an injunction in equity, shall be equal to a release of errors."

The legislature, in this provision, do not mean to embrace such a case as the one before the court. For although a mistake of the clerk in some sense is an error, yet the law does not contemplate a prohibition upon a court to correct its own records. The object was, to prevent a party, under the circumstances, from prosecuting a writ of error. This is manifest, from the fact that a judgment on confession is also made a release of errors. The legislature intended to prohibit a party from taking a writ of error to reverse a judgment which he had himself confessed. But it cannot be supposed that it was intended, that the clerk, in entering up the judgment so confessed, should make a mistake, that such mistake was beyond the power of the court. Suppose A has a power of attorney from B to confess a judgment for five hundred dollars, and he comes into court, files the power of attorney, and confesses the judgment, and the clerk by mistake enters it up for five thousand dollars; would it be contended that the party in such case was remediless? And yet the argument would lead to such a result.

We think there is no error in the record, and affirm the judgment.

HEFFLY vs. HALL.

1. All lands held by entry are subject to execution at law by the act of 1794, ch. 5.
2. A liberal and not a restricted construction will be given to the proceedings of justices of the peace.
3. Where an execution was ordered against several defendants by a justice of the peace and the constable levied it on real estate, returning it with an endorsement of no property of the defendant found, the word defendant will be construed to be *nomen collectivum* and to mean defendants.

Helm recovered judgments against Hall and Stuart before a Justice of the Peace for the county of Henderson. Executions were issued and levied on two hundred acres of land, and the original papers were returned to the Circuit Court of Henderson county. The executions were endorsed as follows: "The defendant has no personal property in my county to satisfy the within *fi. fa.* Levied on 200 acres of land," &c. &c.

The land was ordered to be sold, and was sold by the sheriff of Henderson county, and Heffly became the purchaser.

Heffly instituted this action of ejectment against Hall in the Circuit Court of Henderson county to recover the said two hundred acres of land; and on the plea of not guilty, at the March term, 1835, Read, Judge, presiding, a verdict and judgment were rendered in favor of the defendant. The plaintiff appealed.

McLanahan, for the plaintiff.

Bullock, for the defendant.

TURLEY, J. delivered the opinion of the court.

This is an action of ejectment, in which the plaintiff claims title by sheriff's deed, based upon a sale made by order of the Circuit Court of Henderson county upon judgments rendered by a Justice of the Peace, upon which executions had been returned *nulla bona*, and thereupon levied on the land in dispute.

To the validity of the sale, two objections are taken by the defendant in error. 1st. It is insisted that the land having been entered under the act of congress lately passed for that

[Helly vs. Hall.]

purpose, and not being granted at the time of the levy and sale, was not legally liable to execution. To this we cannot give our assent. By special enactment lands in this State held by entry, are liable to execution, as if they had been granted; and we do not recognize the distinction attempted to be drawn between entries founded upon North Carolina warrants, and entries such as this, founded upon a money consideration under the act of congress. They are alike the subject of execution.

2nd. It is said, that inasmuch as the judgments and executions upon which the land was sold were against several, and the return by the officer is, "no property of the defendant found upon which to levy," that the return is defective, and the consequent levy upon the land illegal; for, *non constat* that though one of the defendants had not personal property upon which to levy, the others had not; and if any one of them had, the land could not be sold.

However much we may regret that land titles should ever be made to depend upon the fleeting and uncertain judgments of Justices of the Peace, yet inasmuch as the legislative department of the State has thought proper so to make it, we must enforce it, and in such a way as to engender the least possible mischief. This is to be done by giving a liberal construction and not a restricted one, to the proceedings of these tribunals; and in doing this in the case under consideration, we must hold that the word defendant as used in the return, is *nomen collectivum*, and means defendants; and this, *ut res magis valeat quam pereat*.

The Circuit Judge upon one or both these points thought otherwise, and gave judgment for the defendant in the ejectment. Let it be reversed, and the case remanded for a new trial.

UNION BANK *vs.* HOLCOMB.

It is not necessary to the official validity of a notary's certificate that it appear by its date to be made out on the day of notice given.

The Union Bank instituted this action of assumpsit in the Circuit Court of Fayette County, against B. L. Holcomb, and declared against him as the payee and endorser of a promissory note. The defendant pleaded non-assumpsit, and the case came on for trial before Judge Dunlap and a jury, at the May term, 1843. The defendant objected to the validity of the certificate of the notary, it not showing by its date that it was made on the day the notice was given. The Judge sustained the objection and excluded the certificate.

A verdict and judgment were rendered in favor of the defendant. The plaintiff appealed.

Totten and Scruggs, for the plaintiff.

A. Miller, for the defendant.

RESE, J. delivered the opinion of the court.

The suit was brought against the defendant, the payee and endorser of a promissory note. The notarial protest is in due form, and was made on the 1st day of June, 1838, being the third day of grace. On the back of the protest is a copy of the notice; and also the following certificate of the notary:

"Notices deposited in the post office at Jackson, Ten. on the 1st June, 1838, by me, directed to the makers, Memphis, Ten. and to B. L. Holcomb and E. Pegram, Lagrange, Ten. also notices directed to J. H. Gillespie, at Memphis, Lagrange, and Mount Comfort, Ten. J. M. JOHNSON, Notary Public."

The act of 1820, ch. 25, provides, that if the notary certify either in or on his protest that he has given notice of demand of payment and refusal, or the dishonor of a bill, promissory note or writing obligatory, to the endorsers, makers or others concerned, such protest shall be *prima facie* evidence of the fact of such notice: and the act of 1835, ch. 11, sec. 5, in quite gen-

[Union Bank vs. Holcomb.]

eral terms enacts that "the attestation, protestation, and other instruments of publication of the several notaries public of this State, shall and may be received in evidence in any court of record, or before any justice of the peace, in this State."

The court charged the jury, that the notary's certificate that he had deposited notice in the post-office described, &c. would be insufficient to fix the fact of notice upon the endorsers, unless said certificate bore an even date with the protest, although it stated the notice to have been deposited in the post-office at the proper time. We are unable to discover in the acts of assembly above quoted, any warrant for the grounds upon which the Circuit Court places the case.

The first act makes the certificate endorsed, *prima facie* evidence of the truth of what it imports, and if it shows that the notices were deposited in due time, and states that time in the body of the certificate, we are not to treat it as invalid because it has not a formal date identical with, but departs from the date of the protest. The other act makes the attestation, protestation, and other instruments of publication of notaries public of this State, not *prima facie* evidence only, but evidence in any court of record. The certificate endorsed, therefore, in this case, was evidence of the facts set forth in it. And so the Circuit Court should have charged.

Let the judgment be reversed, and a new trial be had.

CARPENTER vs. KEE et al.

Where complainant signed a bill single as a surety on the faith of a promise of the principal that he would confess a judgment and have it stayed by a responsible man, it is held that the failure of the principal to fulfill this promise constituted no ground of equitable relief.

This is a bill which was filed in the Chancery Court at Somerville, to set up an equitable defence to a judgment recovered by Kee against Carpenter and others. The case was tried at the November term, 1844, on bill, answer, replication and proof, by Chancellor McCambell. The bill was ordered to be dismissed, and complainant appealed.

J. C. Humphreys, for the complainant.

G. D. Searcy, for the defendant.

TURLEY, J. delivered the opinion of the court.

This is a bill filed by the complainant to be relieved against a judgment obtained against him and others by John M. Kee, one of the defendants. The causes assigned for asking the relief are, that the complainant became bound for the debt upon which the judgment was rendered as surety for Spencer Jackson; that he was induced so to bind himself upon the express promise that Jackson was to confess a judgment on the note and stay it by a responsible person, which was never done; and upon the ground of usury in the transaction.

That there was usury, defendant Kee admits; but alledges that he released the whole amount thereof upon the execution before the filing of the bill; and the only question left for consideration is, whether the failure of defendant Jackson to confess a judgment and stay it as he promised to do at the time he procured the complainant to become his surety, constitutes a good equitable defence against the judgment; and we are of opinion that it does not. The promise on the part of Jackson was held out as matter of inducement to procure Carpenter's responsibility, and it may be that it encouraged him to risk his

[Crouch vs. Miller.]

liability; but this was done by the defendant Jackson without agency on the part of Kee, and there is no pretence that it constituted a condition precedent to complainant's liability.

We see no reason for supposing that Jackson did not honestly intend at the time to do what he promised; and his failure to do so is a mere breach of such promise, without fraud on his part. Certainly the defendant Kee had no power to compel him to confess the judgment and stay it; and this not having been done, he in a reasonable time commenced suit and obtained the judgment complained of.

The complainant has trusted to the promise of Jackson, has been disappointed in its performance, and upon every principle must abide the loss.

Decree affirmed.

CROUCH vs. MILLER.

Recoupment of damages is allowed the defendant in cases where the plaintiff who has only partially performed his portion of the contract comes into court asking compensation for such partial performance.

This is an action of assumpsit brought by Miller against Crouch, in the Circuit Court of Shelby county.

The case was tried by W. H. Looning, Special Judge, and a jury of Shelby county, on the plea of non-assumpsit, at the October term, 1844, and a verdict and judgment rendered for the plaintiff, from which the defendant appealed.

E. M. Yerger, for plaintiff in error.

V. D. Barry, for defendant in error.

GREEN, J. delivered the opinion of the court.

Miller redeemed from Crouch a tract of land which had been sold as the property of Redford. Crouch insisted that in addi-

[Crouch vs. Miller.]

tion to the sum bid at the sale, Miller should take up a note on Redford, payable to one Porter and endorsed to Crouch. To this Miller agreed, provided Crouch would refund the money, should it turn out that Miller was not legally bound to pay this note in order to redeem the land. To this Crouch agreed, and Miller took up the note. This suit is brought for the amount so paid.

It is not pretended that Miller was bound to take up the note in order that he should be entitled to redeem the land; but it is insisted, that while he held the note it fell due, and that he failed to demand payment of Redford, and notify Porter the endorser, whereby Porter is discharged, and a loss to Crouch of the debt has thus accrued by Miller's laches; for which he is liable in damages; the amount of which should be allowed him by way of recoupment in this action. This is no case for recoupment of damages. The cases of recoupment where a party has sustained injury by reason of the non-performance of a contract, and the party thus failing to perform comes into court to recover so much as he may deserve to have for his partial performance, have no analogy to the present case. 1 Cow. R. 359; 3 Hump. 56.

It is not necessary to enquire whether Miller is liable for failing to make demand and give notice in this case, in any form of proceeding. It would be difficult to fix upon him that duty, by reason of the contract between the parties as set forth in this record.

Affirm the judgment.

GREER vs. PERKINS.

1. In an action against a partner of an unincorporated banking association, or against a bank, where such bank or partner relies on the statute of limitations, defendant must show that the note was last issued by the bank or association more than six years before suit brought.
2. The date of a bank note furnishes no presumption that it was put into circulation at that time.

There was an unincorporated association in the town of Holly Springs, Mississippi, organized in 1837, for the purpose of carrying on the business of banking. The company issued notes to be used as currency and which were used as such, received deposits, &c. &c. On the 16th day of October, 1837, a note was executed which was of the following tenor:

"\$50. On demand, one day after date, the Real Estate Banking Company of Holly Springs promises to pay to A. R. Govan, or bearer, fifty dollars. Holly Springs, Miss. October 16th, 1837. JAM. MCCORCKLE, Pres. WM. HARLEY, Cashier."

On these notes was endorsed, "Real estate mortgaged and individual property for amount subscribed by each stockholder."

This note came to the hands of Nicholas T. Perkins by delivery and was by him presented for payment at the office of this banking company in Holly Springs, on 20th October, 1838, and payment refused.

On the 26th day of March, 1844, Perkins brought suit by warrant against Greer, one of the partners in said concern, before a Justice of the Peace in the county of Shelby. A judgment was rendered in favor of the defendant, and Perkins appealed from the judgment to the Circuit Court.

The case came on for trial at the February term, 1845, J. C. Humphreys, Special Judge, presiding. The defendant relied on the statute of limitations, upon which subject the Judge charged the jury, that if they should believe, from the testimony, "that such alledged unincorporated company were associated for the purposes of banking, and in the ordinary business of banking issued their notes in the usual form of bank notes, with a view to their circulation as currency and that they did

[Greer vs. Perkins.]

circulate as currency, and that they were in the habit of receiving such notes on deposit and in payment of debts, or otherwise, and reissuing the same, and that the note sued on was of the kind and character above mentioned, the statute of limitations would not operate as a bar to a recovery, unless it should be shown that within six years before the commencement of suit, payment of the note had been demanded of and refused by said company, or that said note had not been reissued within that time."

The jury rendered a verdict for the plaintiff, from which the defendant appealed.

E. M. Yerger, for the plaintiff in error.

The charge of the court below amounts in substance to this: that the statute of limitations did not commence to run until demand was made and payment refused. This is erroneous.

1. Upon a note payable on demand no actual demand is necessary, and a cause of action immediately accrues and the statute commences running immediately from the date. *Angell & Ames on Lim.* 132; 13 *Wendell's Rep.*

The charge of the court below went upon the ground that the statute of limitations was not applicable to bank notes; and not being applicable to them, did not apply to the note upon which this action is brought.

This reasoning will not do. Admitting that the statute does not apply to bank notes, yet this is the note of a private partnership and the members of the company are responsible in the same manner and are subject to all the liabilities, and enjoy the same rights and privileges as partners in private partnerships, and no more nor less. This was so determined in the state of Mississippi, in the case of *Brisgenard et als. vs. Wall*, 1 *Smede & Marshall's Chan. Rep.*

But we do not admit that the statute of limitations does not apply to bank notes. It says, all actions of debt not upon specialty shall be barred unless sued upon in six years, &c.

This is a bar to every cause of action for which debt may be brought. 3 *Peters' Rep.* 277.

[Greer vs. Perkins.]

The statute makes no exceptions in favor of bank notes, and when that does not, the court cannot.

A court should not feel at liberty to break in upon its construction by allowing an exception which has not acquired the complete sanction of authority. 8 Cranch, 98.

The only case which at all favors the notion we are combating is a case in 16 Mass. Rep. 65. That case does not decide the point, for it was not raised in it; and as a mere dictum it is entitled to no weight. The court seemed to think the statute of limitations went merely upon the presumption of the payment of the debt, when in fact the statute is intended as a statute of repose, and the very passage of it does away with all presumption, and makes the bar positive.

The charge of the court below should have been, that if the jury believed the note to have been reissued within six years before the commencement of the action, that such reissuance amounted to a new promise, sufficient to take the case out of the statute. This charge would have left the *onus* of showing the new promise upon the plaintiff, who replies and who is bound to show it, and that clearly and conclusively. See *Bell vs. Morrison*, 1 Peters' Rep. 360. If the law is as charged, it would devolve upon the defendant to show that he had made no new promise or incurred no new liability, sufficient to take the case out of the statute, which proposition is too unreasonable to need argument to disprove.

H. G. Smith, for defendant in error.

Upon bank notes payable on demand, does the statute of limitations of six years run in favor of the banking company, beginning with the date of the bill in absence of proof of the actual day of issuance—is the question here.

Upon the promissory notes of private persons payable generally on demand, an action accrues immediately to the holder, and consequently the bar begins with the date.

But bank notes seem to stand on different footing. They are not as private notes mere evidences of debt, made to be presented and paid at or shortly after the execution. They

[Greer vs. Perkins.]

are issued for currency—to be used as money—put in circulation to remain out, not expected or desired to be held or returned as evidences of debt, for payment.

Further: private notes are presumed to be executed at their date. Being the evidence and security for a debt, it would be against common usage and probability to suppose them executed before the debt existed. Not so with bank notes. They are made before the debt to be evinced by them accrues. They are prepared to be ready for issuance as cash, when any borrower applies for them. They are in the ordinary course of banking business issued and reissued from time to time as they may be paid in and out. Hence the date of a bank note ought not to be presumed its day of issuance, nor that action accrued at the date, nor that the statute runs from that day. 15 Mass. 65.

Whether an action accrues upon a bank note payable generally on demand, without a previous demand being made, seems to be an open question. The weight of authority rather inclines in favor of the action without previous demand. In New York, in 18 J. R. 493, and in 3 Wend. 13, Woodworth in the former and Savage in the latter case, state such to be their opinion. And in Baily on Bills, 197, n. a case is cited from 1 Southard's Rep. 382, in which the doctrine is so held.

There seems much reason for holding that bank notes ought not to sustain an action without demand. And hence in New York the question has been repeatedly avoided and left open.

The consequences would be alarming to presume the date of a bank note to be the day of its execution or last issuance, and to hold that the statute of limitations begins to run from the date in the absence of express proof of the day of last issuance. It would enable banks to practice great frauds, and would discredit all notes more than six years old.

It is not perceived that any difference subsists in respect of the question involved here, between the bank notes of corporate and unincorporate banking companies.

The case in 16th Mass. is the only one bearing on the question, I have been able to find upon very diligent search.

[Greer vs. Perkins.]

GREEN, J. delivered the opinion of the court.

This action is brought by Perkins on a fifty dollar note of the Holly Springs Banking Company, against Greer, the defendant below, as one of the partners in that company. The defendant relied on the statute of limitations. The court charged the jury in substance, that the statute of limitations would not operate, unless the defendant had shown by proof that payment of said note had been demanded and refused, more than six years before the suit was brought, or that the said note had not been reissued within that time.

It is insisted that there is error in both propositions of this charge. It is supposed that the Judge intended to instruct the jury, that before a suit could be maintained upon a note payable on demand, an actual demand must be made. This is an erroneous interpretation of the language of the court. The principle asserted in the charge is, that it must be shown by the defendant who relies on the statute of limitations, that the cause of action accrued more than six years before the suit was brought. And in this case that fact may be shown by proving a demand more than six years before suit brought, as it will be presumed it was not reissued subsequently to such demand; or if the fact be not shown by some other proof that the note had not been reissued within six years, no cause of action would have existed for the time to form the bar.

We are all of opinion that the court did not err against the plaintiff in error in this charge. The date of a bank note furnishes no presumption that it was put into circulation at that time. They are, as we know, prepared and kept ready for circulation previously to the time of their actual issuance; and until they are actually issued, no liability is incurred, and no cause of action can exist. And as the banks are constantly receiving their own notes from their debtors, each note so received is thereby paid up and discharged, and no cause of action can exist until it is reissued. Then a new liability is incurred, commencing not from the date of the note, but from the time of such reissuance. Therefore such a bank, or (if it be

[*Vincent vs. Ashley.*]

unincorporated) such partners of a banking company, who may be sued on their note, to avail themselves of the statute of limitations must show that the cause of action accrued more than six years, that is, it must appear that the note was last issued by the bank more than six years before the suit was brought.

Affirm the judgment.

VINCENT vs. ASHLEY.

A champertous agreement made by one of the complainants for the others to prosecute the suit, affects the interest of all. The suit is an entire thing, and being tainted by champerty as to the interest of one, must be dismissed.

James, William and Francis Ashley having a claim upon slaves in the possession of Vincent, engaged the complainant James to attend to the prosecution of a suit for the recovery of the slaves in their joint names. James engaged Rogers to attend to the prosecution of the suit on an agreement to receive one third of the slaves if he should succeed in the recovery of them.

A bill was accordingly filed against him, and during the pendency of said suit, this bill was filed against the complainants, charging a champertous agreement. William and Francis answered, and denied any knowledge of such agreement, and stated that the management of the suit had been intrusted to the defendant James.

The records do not show how this case was brought into the Supreme Court.

Totten, for complainant.

Fitzgerald and *Gibbs*, for defendants.

TURLEY, J. delivered the opinion of the court.

A bill was filed by the defendants against the complainant in the county of Weakley, to recover certain slaves in his pos-

[*Vincent vs. Ashley.*]

session and claimed by them; whereupon this bill was filed, charging a champertous agreement between the Ashleys and one J. Rogers, by which he (Rogers,) in consideration of a portion of the property to be recovered, undertook to commence and prosecute the suit against him, and asks that it be dismissed.

That the champertous agreement charged was entered into, and that this suit was in pursuance thereof commenced and prosecuted by the defendant Rogers, is not controverted, but admitted in the answer.

It is however contended, that the contract was entered into between James Ashley and J. Rogers without the knowledge of the other two claimants, and that their right to recover is not to be prejudiced thereby.

It appears from the answers, that James Ashley was appointed agent by his co-defendants to take the proper steps to recover the negroes in controversy, and as a means of doing so, made the champertous contract with J. Rogers; and the question is, whether this taints the whole suit, or only so much of it as affects his interest therein. We are constrained to say that it extends to the whole. We cannot divide and separate the interests of the parties, in the manner proposed. The suit is an entire thing, commenced in violation of express law, and under a contract made by one of the parties for and on behalf of himself and the others. But for the fact, that the suit has been so long depending that the statute of limitations is now a bar to further proceedings, we apprehend the distinction now sought to be taken would not have been thought of. The fact, that the statute operates as a bar, can make no difference in the action of the court upon this subject. The suit was illegally commenced, and we are bound to dismiss it. Let it be done.

GRAHAM et als. vs. LAMBERT et als.

When a deed of conveyance was made, absolute on its face, but a bond given, binding the vendee to divide the estate equally with the brothers and sisters of the vendee, and the bond was delivered to the vendee: It is held the delivery to the vendee was for the benefit of the brothers and sisters, and was a part of the contract of conveyance, and could not be surrendered without the consent of those for whose use it was made.

M. Brown, for Graham.

Fitzgerald, for Lambert.

TURLEY, J. delivered the opinion of the court.

This is a bill filed by the complainants, to review a decree rendered against them, and in favor of the defendants, at the August term, 1836, of the Circuit Court of Perry county.

We are satisfied by an inspection of the testimony and record in that case, that the decree ought not to be reviewed.

The facts appear to be, that some time in the year 1828, one Samuel Cohorne, an old and ignorant man, residing in the county of Perry, had his fears excited by false information, that a judgment had been rendered against him in East Tennessee, upon which an execution had issued, which would be levied upon his property. This information was, the whole of it, false; there was no judgment, and no execution, unless it were a forged one; the whole thing being a conspiracy against him, in order to extract money from him.

Thus operated upon, he on the 24th day of May, 1828, executed a deed of conveyance for all his property, including negroes, stock of various kinds, household and kitchen furniture, &c. to his daughter Mahala Johnson. This deed was voluntary and unsupported by any valuable consideration.

Simultaneous with the execution of this deed, Mahala Johnson executed a bond to Ephraim Cohorne, to Matthias Smith for and in behalf of his wife Polly, Jacob Lander for and in behalf of his wife Delilah, Daniel Cauder for and in behalf of his wife Nancy, James Lambert for and in behalf of his wife Amy; the said Polly, Delilah, Nancy and Amy, being all daughters of

[Graham et al. vs. Lambert et al.]

Samuel Cohorne, and sisters of the said Mahala Johnson, by which she bound herself in the penalty of three thousand dollars, to convey to them at the death of her father, an equal share of the negroes conveyed to her, and their increase.

This bond she delivered to her father. She afterward intermarried with Robert Graham, and they by some means or other induced him to deliver up this bond, and leave the deed of sale absolute upon its face in their possession. After the death of said Samuel Cohorne, Ephraim Cohorne, his son, and Matthias Smith and wife, Jacob Lander and wife, Daniel Cauder and wife, James Lambert and wife, his sons-in-law and daughters, filed their bill against said Robert Graham and wife, to have this bond set up, and for a division of the negroes in pursuance of its terms, all which was decreed by the court, and it is this decree which we are now asked to review and reverse.

That Samuel Cohorne was really imposed upon at the time he executed the deed to his daughter, Mahala, is evident; whether she was a party to this imposition or not, it is not material to discuss: we are satisfied that the complainants in the original bill were entitled upon other grounds to the relief they obtained. Samuel Cohorne intended, in executing the conveyance, to secure the interests of all his children in his property, in an equal degree, and, therefore, caused his daughter, Mahala, to execute the bond to his other children, as is already stated. This bond was delivered to him for their use and benefit, and not for his, for he had retained for himself a life estate in the property by the deed. The bond having been thus delivered, was as effectual as if it had been delivered to the parties themselves, and Samuel Cohorne had no legal power to cancel it without their knowledge and consent. It had become a part of the conveyance to his daughter, Mahala, and they both together constituted a conveyance and settlement of his negroes upon all his children at his death, which is supported by the consideration of love and affection.

But it has been argued, that the conveyance was made to defraud creditors, and that, therefore, the defendants to this bill of review can acquire no right under their father. To this it is easily answered, that there were no creditors; that Samuel Co-

[The State vs. Hunter.]

horne was fraudulently deceived, when he was induced to believe otherwise; and that even if there had been, the division of the negroes was a part of the contract, which must be considered as valid to its whole extent, or invalid to its whole extent. The complainants and defendants both claim under the same instruments, and if they are void as to the one, so they are as to the other.

There is, therefore, no error in the decree, and the bill of review will be dismissed.

THE STATE vs. HUNTER.

An assault may be presented by the grand jury, though not made during term time, and this by virtue of the provisions of the act of 1842, chap. 141, sec. 4.

Hunter was presented by the grand jury of the county of Obion, for an assault and battery on the body of T. Robbins.

The presentment did not show on its face, that the offence was committed during term time, and the defendant moved the court to quash the presentment, on the ground of want of power on behalf of the grand jury to make presentment of this offence, except in cases where it was committed during term time.

The court quashed the presentment, and the Attorney General, Williams, appealed on behalf of the State.

Attorney General, for the State.

Williams, for the defendant.

REESE, J. delivered the opinion of the court.

The defendant was presented by the grand jury of Obion county, in the Circuit Court thereof, for an assault and battery. The presentment did not alledge that the assault and battery were committed during the term of the Circuit Court. A mo-

[The State vs. Hunter.]

tion was made on behalf of the defendant to quash the presentment, and the motion was sustained by the Circuit Court, and the presentment was quashed.

This was done, probably, because, before the organizing acts of 1835-6, the Circuit Court had no jurisdiction over that offence, unless committed at the place, and during the time of holding a Circuit Court; and because the said acts transferring from the County to the Circuit Courts the jurisdiction of the former, did not at all enlarge in that respect, so far as punishment was concerned, the jurisdiction of the Circuit Courts; for the act of 1825, ch. 14, sec. 2, provided, "that it should not be lawful for grand juries in the County Courts of this State, to make presentments against any person or persons, for any assault and battery, or for any affray, unless the same be committed in their presence, during the term of the court." But the Circuit Court in this case probably overlooked the 4th section of the act of 1842, ch. 141, which provides, "that all violations of the penal laws may be prosecuted by indictment or presentment of a grand jury, and in case of a prosecution upon presentment, it may be made on the information of any one of the grand jury."

This general provision is inconsistent with, and repeals the act of 1825, and gives to the Circuit Court jurisdiction, by presentment or indictment, of the offences of assault and battery, and affray, as was possessed by the County Court before the passage of the act of 1825, ch. 14.

This conclusion is, we think, free from all doubt, and it is grateful to reflect, that the good sense, right feeling and love of order on the part of the legislature, were so far in the ascendant, as to induce them to restore to the grand inquest of the county their salutary superintendence over a class of offences, which are often of enormous magnitude; and the licensed impunity of which was alike fatal to the peace and quiet, and disgraceful to the social character of the community.

The judgment of the Circuit Court will be reversed, and the case remanded for further proceedings.

KNIGHT *vs.* THE STATE.

If an affidavit for a continuance be not full, satisfactory and direct as to material allegations necessary for a continuance, exhibiting palpable error in a refusal of the Judge to continue the case, the court will not reverse for such refusal.

Knight was indicted on the 29th of October, 1844, in the Circuit Court at Memphis, for grand larceny. The case was called for trial on the 1st day of November, when the defendant moved the court for a continuance, upon an affidavit, which averred that — Yale and — Yale were material witnesses for him in the trial of his case—that he could not go safely to trial without the benefit of their testimony—that he would have had them subpoenaed to attend at this term of the court, but that he has been in confinement in jail ever since his arrest, and has in this manner been deprived of the power of preparing his defence—that he expects to prove by said witnesses, that he was not about the place where the property set forth in the bill of indictment was said to have been stolen, until some hours after the same was taken from the possession of the owner of said property—that said witnesses are absent without his advice or procurement—that he knows of no other person by whom he can prove the same facts—that he expects to obtain the benefit of their testimony at the next term of the court, and that the continuance was asked for justice and not merely delay.

The presiding Judge, King, refused the continuance, and thereupon the case was submitted to a jury, and the defendant found guilty, and sentenced to confinement in the penitentiary for five years. From this judgment he appealed, on the ground of error in the Judge, in not granting him a continuance.

Henry Barry, for plaintiff in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an application on the part of the prisoner, by an ap-

[Knight vs. The State.]

peal in the nature of a writ of error, to reverse a judgment rendered against him in the Criminal Court at Memphis, for the offence of grand larceny, upon the ground, that the Judge refused him a continuance at the time he was put upon his trial.

What has been said at the present term, in the case of *Bellew vs. The State*, relative to the course of action pursued by this court, in cases of this kind, is equally applicable to the present case.

The affidavit upon which prisoner moved for a continuance, states, that one James S. Young is a material witness for him—that he expects to prove by him that he was not about the place where the property was said to have been stolen, and for which he was indicted.

This affidavit, if possible, is of a more doubtful character than that in the case of *Bellew*. “Was not about the place;” what does he mean by that? That he was not at the place? If so why not say so? Does he mean that he was at another place, and, therefore, expected to prove an *alibi*? If so why not so state it?

The affidavit is evasive, and insinuates without charging the existence of a fact, which, if true, would constitute a good defence. The Criminal Judge committed no indiscretion in refusing a continuance.

Let the judgment be affirmed.

THE STATE vs. CURTIS.

1. When a juror in a criminal case becomes so sick, that it is impossible to proceed with the trial of the case, the court may in its discretion discharge such juror and swear another in his stead, or discharge the whole jury and continue the cause till the next term.
2. The mere fact of harboring and concealing a slave, with a view to deprive the true owner of him, does not constitute a felony by the act of 1835, ch. 59: such slave must have been also persuaded to leave the owner.

John W. Curtis was indicted in the Circuit Court in Shelby for harboring a slave, the property of Joshua S. Curtis. He was put on his trial on the 13th day of October, 1843, Dunlap, Judge, presiding. On Saturday the 14th, the jury reported that they could not agree, and they were continued under the care of an officer. On Monday the 16th, the jury returned into court and reported that they could not agree. Whereupon they were continued under the charge of an officer. On the 17th the jury again reported to the court that they could not agree. The jury were then discharged, as appears by the following entry:

"And it appearing to the satisfaction of the court, from testimony adduced, that John Cowgill, one of the jurors herein, is so seriously indisposed as to render it unsafe for him to continue further the effort to arrive at a verdict in this behalf; it is ordered, that a juror be withdrawn, and the balance of the jury from rendering a verdict in this behalf be discharged: and that the defendant be remanded to jail, to await his trial at the next term of this court; to which opinion of the court, in discharging the jury, the defendant excepts."

He was again put on his trial at the June term, 1844, King, Judge of the Criminal Court at Memphis, presiding, when he was convicted on the fourth count of the indictment, and sentenced to three years imprisonment.

The fourth count in the indictment is as follows:

"And the grand jurors aforesaid, do further present, that the said John W. Curtis, late of the county aforesaid, laborer, on the 26th day of June, in the year 1843, with force and arms, in the county aforesaid, unlawfully and feloniously did harbor and conceal a certain other slave named Mary, a slave for life,

[The State vs. Curtis.]

of great value, to wit, of the value of five hundred dollars, the property of one Joshua S. Curtis, then and there being, with the intent and purpose of him the said John W. Curtis to deprive the said Joshua S. Curtis, the true owner of said slave, Mary, thereof, contrary," &c.

On motion of the defendant, judgment on this count was arrested, and the defendant ordered to be discharged.

The Attorney General, in behalf of the State, appealed.

Attorney General, for the State.

H. A. Barry, for the defendant.

GREEN, J. delivered the opinion of the court.

The indictment in this case has fifteen counts. In the 4th count the defendant is charged with feloniously harboring and concealing a slave, Mary, the property of John S. Curtis, with intent to deprive him, the true owner, of the said slave.

The defendant was put upon his trial the February term, 1844, of the Shelby Circuit Court; and after the evidence had been heard, and the cause submitted to the jury, who had been charged with the defendant's case four days, "it appearing to the court that John Cowgill, one of the jurors herein, is so seriously indisposed as to render it unsafe for him to continue further, the effort to arrive at a verdict in this behalf; it is ordered, that a juror be withdrawn, and the balance of the jury, from rendering a verdict, be discharged."

The cause was continued until the June term, 1844, when the defendant was again put on his trial, and the jury found him guilty as charged in the 4th count of the indictment. A motion was made in arrest of judgment, which was sustained by the court, and the defendant was ordered to be discharged, from which judgment the Attorney General, in behalf of the State, appealed to this court.

It is insisted that the judgment was properly arrested, for two reasons:

1st. Because the court had no power to withdraw a juror

[The State vs. Curtis.]

and discharge the jury from rendering a verdict at the February term, 1844; and that having done so, the prisoner had a right to be discharged.

2d. That the facts charged in the 4th count, upon which the prisoner was convicted, do not constitute felony.

Upon the 1st question, it is insisted that the act of 1817, ch. 99, sec. 1, prohibits the discharge of the entire jury, upon the sickness of one of their fellows. It is not denied, but that such sickness of a juror is sufficient cause for discharging the panel at common law. Chitty says, (Crim. Law, vol. 1, page 545,) "where a juryman is taken ill during the trial, the jury may be discharged." And this court in the case of *Mahala vs. The State*, (10 Yerg. 537,) held, that a physical impossibility to procure a verdict—such as the sickness of a juror—justified the court in discharging the jury. But it is said, the act of 1817 is imperative, that in case of the sickness of a juror, another shall be summoned, and the cause shall be immediately tried *de novo*. We do not concur in this view of the act. We regard it as only directory as to the mode of proceeding when the case provided for shall occur. By the common law, when a juror becomes sick, the whole jury is broken up, and the same eleven that had before been sworn are put to the prisoner, and may be challenged by him. (1 Ch. Cr. Law, 545: 4 Taunton, 309.) But by the act of 1817, a juror is to be summoned *instantly* in place of the sick juror, and sworn, the eleven remaining as part of the panel elected, are not subject again to challenge, nor are they again to be sworn. 5 Yerg. Rep. 160. The right of challenge is confined to the juror newly summoned, alone. But these principles of the common law, and provisions of the statute, by which, in case of sickness of a juror, a trial may be had *de novo, instantly*, do not prevent the court from postponing such new trial to another term. It may in its discretion supply the place of the sick juror, and proceed to try the case *de novo*, or discharge the jury and continue the cause.

2d. We are next to examine the allegations in this indictment, and see if they constitute a charge of felony. By the act of 1835, ch. 58, it is provided, that "if any person or persons whatever shall directly or indirectly tempt or persuade

[The State vs. Curtis.]

any slave or slaves to leave his, her or their master or mistress' service, with an intent or design to carry him, her or them out of this State, or with the intent or design to deprive the true owner thereof, or shall harbor or conceal such slave or slaves for that intent or purpose, such person or persons shall upon conviction thereof, before any tribunal in this State having jurisdiction thereof, be adjudged guilty of felony, and shall for every such offence be confined in the jail and penitentiary for a term not less than three nor more than ten years."

The charge in the count of this indictment under consideration, is, that the defendant "wilfully and feloniously did harbor and conceal a certain other slave," with intent to deprive the true owner thereof.

The question is, whether the mere fact of harboring and concealing a slave, with intent to deprive the owner thereof, is a felony under this statute. And we think it is not. The words in the statute "or harbor or conceal such slave," are not intended to constitute a distinct offence of themselves; but they relate to the previous clauses of the act, and refer to such slave as may have been persuaded or tempted to leave the owner. The word *such* necessarily relates to the previous enactment, and means "the slave so tempted to leave the owner." If a distinct offence had been intended, the language would have been, "or harbor or conceal any slave," not "such slave." The indictment should have charged, that the slave, having been tempted and persuaded, left the owner, and having so left, was harbored and concealed by the defendant.

The judgment was properly arrested, and we affirm the judgment of arrest.

GRAHAM'S heirs et al. vs. NELSON'S heirs et al.

1. Naked trespassers pleading the statute of limitations cannot connect their possession with the possession of the holders of the legal title, who are sued and do not plead the statute, so as to form the bar of the statute.
2. Pleas in bar in Chancery, based on matters *in pais*, must be verified by the oath of the defendant.
3. After a sale of real estate, and before conveyance of title, the vendor is a trustee for the vendee, and whilst his possession can be reasonably presumed to be in accordance with the trust, it will be construed for the benefit of the *cestui que trust*, and the act of limitations will not operate.
4. Where both parties, claiming title to real estate, were non-residents, the statute of limitations did not begin to run against the right to divest title by bill in Chancery till the passage of the act authorizing such bills to be filed where the real estate lies.

This case was argued by *Thomas Washington* and *Talbot*, for the complainants, and by *S. McLanahan* and *Searcy* for the defendants.

GREEN, J. delivered the opinion of the court.

The bill in this case was filed by Joseph Graham, and the heirs of Lewis Beard, against the heirs of John Nelson, the 9th of September, 1831.

John Nelson, by a deed of assignment, for the consideration of \$2,000, sold and transferred to Joseph Graham and Lewis Beard, all his right, title and interest in an entry of five thousand acres of land, in John Armstrong's office, No. 1121, which was located in the name of Robert Nelson, and transferred to John Nelson, and which called to lay, "joining Samuel Nelson's entry, beginning at the most eastwardly corner of his entry, and running down Clear creek into the waters of Tennessee, for complement. October 30th, 1783." The said deed empowered the surveyor to make return of all proceedings in the names of the said Joseph Graham and Lewis Beard. This assignment is dated the 15th of February, 1812.

It appears that the land described in this entry could not be identified, and the warrant had been withdrawn as early as 1807, and filed with the Board of Commissioners of West Tennessee, with a claim for a duplicate. The warrant was adjudged valid, but it remained in the office of the said Commissioners until 1820. On the 1st Wednesday in November, 1820,

[Graham's heirs et als. vs. Nelson's heirs et als.]

a certificate, founded on said warrant, was issued to John Nelson, authorizing him to enter 5000 acres of land by virtue of warrant No. 1121, and that he was entitled to location No. 1337. An entry was made by virtue of this certificate in the 11th Surveyor's District, No. 187, in the name of John Nelson for 5000 acres, on the 11th of December, 1820. On the 29th of November, 1822, a grant was issued to John Nelson and his heirs, founded upon the said warrant and entry.

The land thus granted, lies in the counties of Tipton and Haywood; and this bill was filed in 1831, in the Chancery Court at Jackson, setting up the equitable right of the complainants, and seeking to divest the heirs of John Nelson of the legal title. David W. Cook and his wife Caroline M. (who was a daughter and one of the heirs of John Nelson,) answered the bill, and among other defences, they say, that "even if such a transfer had been made as is charged in said bill, it ought to be viewed only as a personal security, and as such, is barred by the statute of limitations."

The other heirs of Nelson filed pleas, alledging that the complainants' cause of action accrued more than seven years before the filing of their bill. The pleas were set down for argument, and when they came on to be heard were adjudged insufficient, and were disallowed by the court, and the parties had leave to answer. No answer was filed, and the bill was taken for confessed, and set down for hearing *ex parte*.

The answer of Cook and wife stated, that the said Cook had, acting for himself and wife and for the other heirs of John Nelson, sold various tracts of land, part of the 5000 acre tract in dispute, to the other defendants, Roddy, Dodson, Bridgman, Jones, Hunt, Means, Colter, Cunningham and Davidson.

Upon the coming in of Cook's answer, the complainant filed an amended bill, making the above named persons parties to the suit, and alledging that, until the fact was disclosed in Cook's answer, they "were entirely ignorant of the pretended purchases of the aforesaid persons," and they by no means admit "that they were made," and requiring said Cook and the aforesaid purchasers to set forth particularly the nature of their sales, and of the authority under which Cook acted. All the pur-

[Graham's heirs et als. vs. Nelson's heirs et als.]

chasers under Cook, filed their answers, stating the date of their several purchases, and that they had all received deeds from Cook, except the defendant Hunt, who had only a title bond. They rely on the statute of limitations of seven years in their several answers. But none of the defendants produce their deeds, or evidence of purchase from Cook, or Cook and wife; nor has any authority from the heirs of John Nelson to Cook been shown, by which he could legally make these sales; nor do the answers alledge, that any of these purchasers have conveyances from Cook and wife, except the defendant Bridgman.

1. The first question, from these facts, is, whether these pretended purchasers from Cook, are protected by the statute of limitations. None of them have been in possession of any part of the land in dispute seven years before the bill was filed. There is, therefore, no pretence of claim under the the first section of the act of 1819. And as no right of action accrued against any of them seven years before suit brought, they are not protected by the second section of that act, unless they can connect themselves with the heirs of Nelson, and avail themselves of such defence as those heirs might have made. But we have seen, that no title paper is produced, showing a purchase by which to connect them with Nelson's heirs. They state in their answers, that they purchased of Cook, as agent of Nelson's heirs, and that Cook had authority from those heirs to sell; but they neither produce evidence of their purchase from Cook, nor of his authority to sell, although the amended bill alledged, that no such sales were actually and *bona fide* made, and that Cook had no authority to sell, and required said sales and the authority to make them, to be particularly set forth. There is, therefore, no connection of these purchasers with Nelson's heirs, by means of any sales made to them by Cook, as agent of those heirs, no such agency having been shown to exist. But it is said Cook's wife was one of Nelson's heirs, and that these purchasers can connect themselves with her title. But it will appear by the answers, that the purchases were not made from Cook and wife, but from Cook alone, and he had no more authority to sell his wife's land, without joining

[Graham's heirs et als. vs. Nelson's heirs et als.]

her in the sale, than he had to sell the land of the other heirs. As, therefore, Cook had no authority to sell, either as husband, or as agent of the heirs of Nelson, these purchasers would have shown no connection with Nelson's heirs, if they had produced evidence of their purchase. But as has been before stated, they do not show themselves to have been purchasers from any one. It is then, the case of a possessor of land, who is a mere naked trespasser, (so far as the proof shows,) unable to protect himself by the length of his possession, attempting to resist the complainants' right, on the ground, that the complainants' bill to divest the legal title out of a co-defendant (with whom no connection is shown) was not brought in time. This we think cannot be done. It is very unlike the case of a defendant in ejectment, who is permitted to show a better outstanding title in a third person. In that proceeding, a party must succeed upon proof of his own title, and if there be a better title shown in a third person, of course he cannot recover, though the defendant have no title. But here the case is very different. The equity of the complainants is unquestioned, and the bill is brought to divest the mere legal title out of these heirs; and the other defendants, though unconnected with the title of those heirs, insist that the bill to divest the title was not brought in time. We think they have no right to make this defence for Nelson's heirs.

2. The next question is, whether Cook and wife are protected by the second section of the act of 1819.

In their answer, as heretofore quoted, they say: "Even if such transfer had been made, as charged in said bill, it ought to be viewed only as a personal security, and, as such, is barred by the statute of limitations." They have by the language used, excluded the idea that they intended to rely on the statute of limitations of seven years on real actions. They say, the deed from Nelson to Graham and Beard, ought to be viewed only as a personal security, and as such, that is—as a personal security—barred by the statute of limitations: of course they rely on the statute of limitations applicable to personal actions. As they were altogether mistaken in putting their de-

[Graham's heirs et als. vs. Nelson's heirs et als.]

fence on this ground—so far as they are concerned; there is no plea of the statute of limitations.

3. As it regards the other heirs of John Nelson, pleas were filed relying on the statute of limitations of seven years; which pleas were set down for argument, and were disallowed by the Chancellor; after which no further defence has been made by them.

The act of 1829, ch. 79, sec. 1, by virtue of which this cause has been transferred to this court for final decision, provides, that it shall be the duty of this court, when any cause may be transferred from the Chancery Court, to revise any decisions, interlocutory decrees, or orders that may have been made in the cause, as though it had been taken up by appeal.

The correctness of the judgment of the Chancellor, in disallowing the pleas in this case, is, therefore, to be reviewed by this court. And we think they were properly disallowed, for two reasons.

In the first place, they are not filed upon oath—and it is laid down, that “pleas in bar of matters *in pais*, must be upon oath of the defendant.” Mit. Pl. 243. Now the facts, upon which the bar of the statute of limitations is formed, are matters *in pais*; and in these pleas, they are the mere suggestions of the solicitor, not verified by the oath of the defendants. They were, therefore, properly disallowed. Indeed they should not have been noticed as pleas on the record; but the fact that they were set down for argument was no waiver of the objections to them, but was a means of obtaining the judgment of the court of their invalidity as defences.

But these pleas were properly disallowed for another reason. This bill alledges that the agent of the complainants was in this country from North Carolina in 1828, and exhibited the complainants' title to the defendants, Cook and wife, and to the youngest son of J. Nelson, deceased, who admitted the transfer to the complainants, Graham and Beard, was in said Nelson's hand writing; that they professed an anxious desire that they should not be sued; promised to have a consultation with the other heirs, and if they would consent, to relinquish all claim to the land; and encouraged the belief, that said consultation would

[*Graham's heirs et al. vs. Nelson's heirs et al.*]

eventuate in a surrender of the whole of their claim to the land by the heirs; that upon the faith of the said promises the said agent forbore to bring suit at the time, and the complainants, relying on these representations, have forbore to sue ever since; and they charge, that the delay in bringing suit was fraudulently obtained by the defendants Cook and Nelson.

It is laid down in Mitford's Pleadings, 241, that "if there is a charge in the bill, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, as fraud or notice of title, that charge must be denied by way of answer, as well as by averment in the plea." Here there is no answer to support the plea, and the charge of fraud is not denied by averment in the plea. It was, therefore, for this reason also, properly disallowed.

4. But we are of opinion, that the statute of limitations has no application to this case. Notwithstanding the general terms of the statute that no suit in law or equity shall be maintained, for any lands, tenements, or hereditaments, but within seven years next after his right to commence such suit shall have accrued, (1819, ch. 28, sec. 2,) it cannot be supposed that the bar was intended to apply to cases where there was no adverse claim to the party entitled to the land. If the party against whom the suit is brought has been holding in subservience to the complainant's right, and his possession has been consistent therewith, it would be an absurd proposition to assume that such possession was a bar to the action.

Upon this principle this court decided the case of *Hammond vs. Hopkins*, (3 Yerg. 525,) and *Guthrie and wife vs. Owen*, (9 Yerg. R.) The case of *Hammond vs. Hopkins*, was a bill to redeem a mortgage. More than seven years had elapsed after the forfeiture, and the mortgagee had been in possession of the land more than seven years. Nevertheless, this court held, that his possession was consistent with, and not adverse to the right of redemption; and that the statute of limitations was no bar. The case of *Guthrie vs. Owen*, was a petition for dower, against which this court said the statute does not run. So here, Nelson's claim was not adverse to, but consistent with the right of the complainants. He had sold the entry 1121 to them, and

[Graham's heirs et al., vs. Nelson's heirs et al.]

in considering the right to the land in the present controversy as being derived from that entry, he must be considered as their vendor of this land. The rule is, that after a sale, and before the conveyance of a legal title, the vendor is a trustee for the vendee, and while his possession can be reasonably supposed to be in accordance with the trust, it will be construed for the benefit of the *cestui que trust*, and the act of limitations will not operate. Angell on Lim. 137-8. In this case there was no act of Nelson which could be construed into a claim adverse to the complainants. It is true, in the case of *Polk vs. Polk and others*, Nelson insists on his right to this warrant. But this claim is asserted only as against the claim of Polk. For in his answer to Polk's bill, in which he resists the claim there set up, he states that he had sold it to others. His litigation with Polk was, therefore, for the benefit of the complainants, and not in opposition to their rights. No subsequent act was done by him or his heirs, which was repugnant to the complainant's claim, until within less than seven years before this suit was brought.

5. But for another reason the act of limitations would not apply, if the question were properly before the court.

It is said all these parties, plaintiffs and defendants, were non-residents of this State, and the contract was made abroad. In such case no action could have been maintained in this State to divest this title until jurisdiction was conferred on the Chancery Courts of the district where the land lies by the act of 1825, and the act of 1827. The act of limitations does not contemplate the bringing an action in another State or Government. It does not operate exterritorially. And as no action could be commenced here until within seven years before this suit was brought, the act has no application to the case.

Decree for the complainants.

BENNETT et als. vs. UNION BANK et als.

1. A deed of trust is a mortgage, with a power conferred on the mortgagee or trustee to sell without resort to a Court of Chancery for foreclosure. The power of foreclosure still belongs to a Court of Chancery, if the party chooses not to act on his power to sell.
2. The charter of the Union Bank, authorizing it "to hold land mortgaged to it by way of security," may take a deed of trust on real estate for the security of debts due the Bank.
3. A deed of trust which gave the debtor five years to pay a debt of \$100,000, such debtor paying \$20,000 annually, with interest from the date, and in default of payment the trustee to sell, is held not be fraudulent on its face.
4. A debtor in failing circumstances may prefer one creditor to another, or secure his debt in preference to that of others; but he cannot cover a much larger amount of property than will satisfy the debt, and postpone for an unreasonable length of time its appropriation. In such case it hinders and delays other creditors from having the surplus applied to the payment of their debts.

This bill was filed by the creditors of Patton & Taylor against the Union Bank and others, to set aside a deed of trust, and to subject to the satisfaction of the judgments of such creditors the estate of said Patton & Taylor, covered by said deed of trust.

The case was tried by Chancellor McCambell, at the February term of the Chancery Court at Huntingdon, held in 1844, on bill, answers, replication and proof. He dismissed the bill, and the complainants appealed.

McLanahan and Scurlock, for complainants.

Totten, for defendants.

REESE, J. delivered the opinion of the court.

About the 1st of March, 1840, Alexander Patton and Wm. Taylor were and had been merchants and partners in trade in the town of Jackson, extensively engaged in business, making heavy purchases of goods on credit, and large sales in the same manner. In the course of these operations they became indebted to the Branch of the Union Bank at Jackson, for money loaned, and bills purchased by the Bank. The amount of their indebtedness to the Bank at the time indicated was about the sum of one hundred and fifteen thousand dollars, for which the

[Bennett et al. vs. Union Bank et al.]

Bank had the security of the endorsement of some three or four individuals. But these individuals were indebted to the Bank on their own account and as endorsers for others, in such amounts, as to render their security upon the paper of Patton & Taylor of no great value to the Bank. At this time Patton & Taylor were indebted, as appears, to others in about the sum of one hundred thousand dollars, and they had effects, choses in action, &c. of the nominal value of one hundred and fifteen thousand dollars; and Patton had real estate and slaves, belonging to him individually, worth sixty thousand dollars. Under these circumstances, with a view to release the endorsers upon the paper of Patton & Taylor, due the Bank, to strengthen the security of the Bank for the ultimate payment of the firm debts, and to leave the active capital of Patton & Taylor to be managed by them for their own benefit and that of their creditors at large, it was agreed that Patton should convey to trustees on behalf of the Bank, the real estate and slaves referred to, and that the firm should convey real estate amounting to a few thousand dollars. Accordingly, on the 3d of March, 1840, the said Patton & Taylor made their mortgage and trust deed to the defendants, Caruthers and Campbell, in behalf of the Bank for the slaves and real estate referred to, to secure to the said Bank one hundred thousand dollars, a part of said debt, leaving fifteen thousand dollars or upwards at large. And the portion of said mortgage and trust deed which sets forth and declares the trusts of the instrument is as follows:

"But the foregoing is in trust and for the purposes hereinafter declared—that is: whereas, the said Alexander Patton and William Taylor are indebted to the office of the Union Bank at Jackson, in the sum of one hundred thousand dollars, for which they have given their note, by the name and style of Patton & Co., bearing even date herewith, payable twelve months after the date thereof, to John W. Campbell, Cashier, at the Union Bank of the State of Tennessee, at Nashville. Now, if the said A. Patton and W. Taylor shall pay off and discharge said note at maturity according to the tenor and effect thereof, then this conveyance to be void and of no effect, otherwise to remain in full force and virtue. Provided, also, if the said A. Patton

[Bennett et al. vs. Union Bank et al.]

and W. Taylor shall pay twenty thousand dollars thereon at maturity, and renew their note for the residue of said debt, paying the discount on the renewal, they shall be permitted to do so, this conveyance continuing in force as security for the part unpaid. And the said Patton & Taylor shall have leave to renew annually, on the payment at each renewal of twenty thousand dollars of the principal and the discount on the residue unpaid, so as fully to discharge said debt and interest which may accrue in five annual payments, this conveyance remaining in full force as a security until the entire debt and interest, which may accrue, shall have been discharged." And the deed then goes on to provide, that "if Patton & Taylor should at any time fail in the above particulars, then Campbell and Caruthers, the trustees, should take said property into possession (the said P. & T. in the mean time being permitted to remain in the possession at the discretion of the trustees) and sell the same," &c. The object of the bill is to set aside the mortgage and trust deed, and to let in the complainants in this bill and other creditors of Patton & Taylor to participate *pro rata*, for the satisfaction of their judgments, in the proceeds of the property conveyed. They place their application mainly upon two general grounds.

1st. That the Bank had no power under the provisions of its charter to take the security in question.

2dly. That the deed should be held to be fraudulent and void against other creditors, either by operation of the facts and circumstances attending its execution, or by construction of law.

As to the first question, the 7th article of the 10th section of the Bank charter provides, that in addition to the lands which the corporation may hold for its immediate accommodation, it shall be lawful to hold such other lands "as shall have been *bona fide* mortgaged to it by way of security, or conveyed in satisfaction of debts." Then the corporation may hold land in three modes.

1st. Small portions, permanently, for its immediate accommodation.

2dly. Lands held in security for debts; and

[Bennett et al. vs. Union Bank et al.]

3dly. Lands taken absolutely in payment and satisfaction of them.

The land in controversy was taken in security for a debt due the Bank. But it is said that the form of the security is not that of mortgage, and that form is mentioned in the statute. If this argument as to form, this *hæret in cortice*, were true in fact, it would not greatly commend itself to our approbation. It may be asked, however, what is a mortgage? It is a conveyance of property to secure the payment of a debt due or to become due, or the re-payment of a sum borrowed. Such is the instrument before us, and the power which an instrument may confer on the mortgagee or a trustee, to sell on default made, without foreclosure in a Court of Chancery, does not change or destroy either its name or character of a mortgage. The power of foreclosure still belongs to the court, if the parties choose not to act on their own powers to sell, and invoke its exercise. See 4 Kent 139, 140, 141, 174. There is no defect then in the legal faculty of the Bank to take and hold the security in question.

2dly. Is the deed fraudulent in fact or in law? As to fraud in fact, there is no color or pretence whatever, that it attaches to the transaction. At the moment of the arrangement, Patton & Taylor were merchants, enjoying a full measure of public confidence, and they believed, and induced the agents of the Bank to believe, that the arrangement entered into, would enable them to sustain themselves in their business, and to meet their engagements to the bank and to other creditors. The bank by the arrangement did not cover all their effects; on the contrary, it left their active means unaffected, to the nominal amount of \$150,000. It did not take a security too large for the debt. It left out of the security altogether fifteen thousand dollars and upwards, and the \$100,000 sought to be secured, embraced property worth not more than \$65,000 or \$70,00. It turned out afterwards, and indeed very shortly, that the members of the firm, like many others of that period, had over-estimated the value and availability of what they called their active means, many indebted to them not being able to pay: upon discovering which, they transferred and assigned all their

[Bennett et al. vs. Union Bank et al.]

effects and choses in action to creditors other than the bank, and including the complainants; and the proceeds arising under said transfer and assignment, applicable and applied to the payment of those creditors, have amounted to fifty thousand dollars, and from five to seven thousand dollars more are expected to arise; while the bank has not received more than the one-half of its debt. So we repeat, that there is upon the record no evidence whatever of fraud in fact.

The next inquiry is, as to whether artificial or legal fraud, arising upon the face of the instrument and by construction of it, shall be held to exist and to avoid the deed. It may be remarked in general, that as to this species of fraud, so far as well considered cases may have authoritatively determined the *indicia* of its existence and the grounds of its application, we are content to follow them. But where a transaction has arisen in good faith, and been free from all fraud and covin in fact, we shall be slow to introduce new heads of legal construction, by which to avoid the solemn deeds and assurances of men. The point of attack upon the deed before us is the length of time given to the grantor; and if the objection upon that mere ground be tenable in such a case as this, it will be difficult for a creditor hereafter, in whose hands a large debt has accumulated, to make an arrangement with his debtor, by which to break up its mass into instalments so that the talents and the means of the debtor may be successfully applied to his extrication; but he must let the whole fall at once like an avalanche upon the ruined debtor, and at the imminent hazard of loss to himself. Undoubtedly time is a circumstance not to be overlooked, in considering the fairness of an instrument taken to secure a debt. If all the property of the debtor or a greater portion of it be included in the assurance, and if its value be greatly or considerably beyond the amount of the debt to be secured, then the period of indulgence to the debtor becomes important to other creditors, because to the surplus beyond the grantee's claim they must look for the satisfaction of their demands. But if the deed leave out a large portion of the debtor's means, and the value of the property included in it does not exceed, or falls short of the amount of the debt to be secured by it,

[Bennett et als. vs. Union Bank et als.]

there being no surplus in which other creditors have an interest—time, if not an immaterial circumstance, ceases at least to be a decisive one, and would not of itself in such a case justify the avoidance of the assurance. So on the other hand, the inclusion in the security of considerably more property in value than the amount of the creditor's claim, would not be a decisive circumstance in the creation of constructive fraud, if the time of indulgence in the assurance were usual and reasonable; because, although in that case the other creditors would be interested in the surplus, still as the time of the delay was reasonable and usual, the deed, by the inclusion of such excess, would not upon its face manifest a purpose to hinder or delay creditors. But if both these circumstances concurred; if the excess in the value of the property over the debt were considerable, and the time of indulgence long, the evidence of a fraudulent purpose on the face of the instrument would become greater, and that evidence would become more and more pregnant in proportion as the excess in value were increased, and the time of indulgence prolonged. These are the two elements, conjointly operating, which mainly entered into the consideration of the court, and controlled its decision in the case of *Mitchell vs. Beal*, 8 Yerg. 134. That case was properly decided upon the facts shown in that record; but that case differs from this greatly. All the property of the debtor seems to have been included. That property was twice the value of the debt secured; the time of indulgence was three years; no annual payments stipulated for; the possession and use of the property for that time expressly reserved to the debtors, and put beyond the control of the trustees, and power given them to sell it on a credit of three years, with no other restriction, but that they should pay the proceeds to the trustee; and there was a further advance by the creditor to the debtors. But here the debtors left out of the deed a large portion of their means, from which fifty thousand dollars have been realized by other creditors. The value of the property not only did not exceed the amount of the debt, but fell short of their entire debt forty-five or fifty thousand dollars, and fell short of the debt named in the deed thirty or thirty-five thousand dollars. The annual payment of twenty

[Bennett et als. vs. Union Bank et als.]

thousand dollars is required, with the interest on the residue; in default of which the property was to be sold. So we cannot say, looking to the face of the instrument, that we see in deed a purpose to hinder or delay other creditors, or that its legal effect would have been wrongfully and improperly to have done so. It is said, if Patton & Taylor had complied with their engagement, that the effect would have been, that although for more than half the time the security would have been inadequate, for the latter half, it would have been too large. But we have already said, that some excess in value is not material when the time is not great; and moreover we do not feel called on to be laboriously astute and subtle in search of hypotheses by which to discover that that which began honestly might in the end be applied to dishonest uses, and so avoid a solemn assurance. The contrary is our duty—to let it stand if it seem fair and honest.

In the event supposed, the creditors would not have been without their remedy of substitution or otherwise.

Let the decree of the Chancellor be affirmed.

JONES vs. PLANTERS' BANK.

1. In the legal computation of time there are no fractions of a day, and therefore the day on which an event happens, or an act is done, must entirely be included or excluded.
2. Whether the day on which an act is done, or an event happens, is to be included or excluded, is not determined by any general rule, but depends upon the subject matter to be acted upon.
3. In ascertaining the time at which the right of redemption allowed by the act of 1820, ch. 11, expires, the day of the sale must be excluded, as the law favors that construction which saves the estate, and prevents a forfeiture of right.
4. Where an execution debtor redeemed his land from the purchaser, the legal right so redeemed inured to the benefit of vendee to whom he had sold the land after the lien of judgment and before sale.
5. Where an execution debtor tendered the redemption money, a bill may be filed by a vendee from such debtor, without making such debtor a party.

This is a bill which was filed by Jones against the Planters' Bank, in the Chancery Court at Huntingdon, to redeem a lot of six acres of land, lying adjoining the town of Jackson, in the county of Madison.

It appears by the bill, that Joseph W. Chalmers was the owner of the lot of land in controversy—that the Planters' Bank recovered a judgment against him for the sum of \$2547—that after the recovery of the judgment, to wit, on the 6th day of May, 1839, Chalmers sold and conveyed the lot to Jones for \$3500, Jones having no information of the existence of the judgment—that on the 3d day of October, 1840, the Sheriff of Madison county, sold the lot at public auction, and the bank became the purchaser at \$25, and took a deed of conveyance on the 5th.

The bill charges, that "on the 3d day of October, 1842, and within two years from the date and actual time of said sale, complainant in consideration of his rights and interest in said land, and as the authorized agent of the said Joseph W. Chalmers, duly and lawfully redeemed the said land by paying to the Planters' Bank of Tennessee the amount of said bid at Sheriff's sale, and all interest, cost and charges incident to the same as required by law, in order to redeem the same. The said Bank not being located in the county of Madison, and its said Attorney not being in the county of Madison, the said redemption money was paid over to the Clerk of the County

[*Jones vs. Planters' Bank.*]

Court of Madison county, at his office in Jackson—all of which said Bank, by its Attorney, had notice.”

To this bill the Bank demurred on several grounds.

1st. Chalmers should have been made a party.

2d. The two years allowed by statute to redeem had expired.

3d. The bill of complaint does not show the amount of the redemption money paid into the Clerk's office, distinguishing the money paid on the amount originally bid, and costs and charges; and does not set forth the certificate of the Clerk of the County Court or the substance thereof.

These grounds of demurrer were argued before Chancellor McCambell, at the August term, 1843, and thereupon he decreed that complainant's bill be dismissed. Complainant appealed.

Totten, for the complainant.

McLanahan, for the defendant.

GREEN, J. delivered the opinion of the court.

The Planters' Bank recovered a judgment against Joseph W. Chalmers and others, upon which a *fi. fa.* issued, and was levied on the land in controversy, which was sold by the Sheriff, and purchased by the Planters' Bank the 3d day of October, 1840. The complainant, ignorant of the lien of the Planters' Bank by virtue of its judgment, purchased the land from Chalmers and took a deed therefor, dated the 6th of May, 1839. On the 3d of October, 1842, the complainant, as the agent of Chalmers, paid into the Clerk's office of the county of Madison, the purchase money bid by the Planters' Bank, and all interest and charges, which the redemption law of 1820 required should be paid, in order to entitle the debtor to a re-conveyance of the land. The bank refused to re-convey, and this bill is brought to enforce the right of redemption.

The defendant demurred; and the principal question is, whether the day of the sale of the land is to be included or ex-

[*Jones vs. Planters' Bank.*]

cluded in the computation of the two years allowed by the law for the redemption. By the act of 1820, ch. 11, the debtor whose land may be sold by execution, may redeem it "at any time within two years after such sale." The sale is an act done or event happening; and according to the old cases, to be found in Co. Litt. 166, Hobart's Reports 180, and 20 Vin. Ab. 266, the computation of time shall commence presently, and include the day of the sale; but if an instrument be made to take effect from the day of the date, the day shall be taken exclusive. But this distinction has not been adhered to, in subsequent cases, either in England or the United States; it originating in a verbal criticism, not warranted by the true meaning of the language employed. If an instrument take effect from the day of the date, it is said the day is excluded by the express words—but that such is not the case, if it take effect from the sealing and delivery. Except in peculiar cases the law computes no fraction of a day. It must be taken entire, and if it be reckoned at all, the whole day is counted. As it is, therefore, indivisible, it is as a mere point of time, embracing only the moment the act is done. And when it is said, a deed shall take effect from the delivery, the meaning is, "from the time of the delivery," which is the same thing as to say, from the day of delivery, for what is the day but the measure of time, and being indivisible, a mere point, the time of delivery is necessarily the day of delivery. But it is argued, that this is a fiction of law—that in fact the day is twenty-four hours, and that the sale occurred at some one hour of the day, after which a portion of the day existed, which must be counted as an entire day. But it may be answered, it is but a fiction of law that counts such portion of a day as an entire day, and if we resort to it at all, let it be carried to the legitimate result, which we have seen must follow. The bill alleges, that in point of fact, the redemption money was paid before the expiration of the two years—that is, at an earlier hour the 3d of October, 1842, than that at which the sale occurred the 3d of October, 1840; so that without the fiction, as to the indivisibility of a day, there would be no question in the case. But all agree the day cannot be divided. We must, therefore, include it or exclude it

[*Jones vs. Planters' Bank.*]

in the computation. It has already been stated, that the distinction in the computation of time, from an act done, and from the day of the date of an instrument, has not been adhered to by the courts. On the contrary, cases exist, when the day of the date has been included, in opposition to the rule, in order to save the right intended to be secured; and on the other hand, where the day the act was done has for a similar reason been excluded. Indeed there has been no attempt at uniformity of decision upon the subject, so that the distinction may be regarded as entirely exploded. The principle that seems to have governed in all the modern cases is, that the time will be so computed, as to save the right intended to be favored by the law, or to be secured by the parties to a contract. Thus in the case of *Pugh vs. The Duke of Leeds*, (Cowp. Rep. 714,) there was power to lease in possession and not in reversion; the *habendum* was "from the day of the date of said indenture" for twenty-one years. It was held, that the day of the date was included—that the deed took effect in possession; and was valid. Lord Mansfield held, that whether the first day shall be included or not, depends on the context and subject matter, and that the first day should be either included or excluded, according to the subject matter or intention of the parties. So in the case of *The King vs. Aderly*, (Doug. 462,) where the day on which the Sheriff's office expired, was held to be included in the six months, after which he is not to be called on to return process. The Court of King's Bench first thought the day should be excluded, but Lord Mansfield, in delivering the final judgment, said, that the act was made for the ease of Sheriffs, and on that ground, chiefly, the court determined that the day should be included. In the case of *Lester vs. Garland*, (15 Vesey, 248,) Sir William Grant, the Master of the Rolls, excluded the day of Sir John Lester's death, from the computation of the six months allowed his sister, Mrs. Pointer, to give security that she would not marry A. Here the computation was from an event happening, and according to the old rule, the day would be included, but to prevent a forfeiture, and in favor of the right, it was excluded. The Master of the Rolls explodes the old doctrine, and declares, that no general rule

[*Jones vs. Planters' Bank.*]

should be laid down, for cases would occur, the reason of which would require that exceptions should be made. In the case of *Dowling vs. Foxall*, (1 Ball & Beaty, 193,) it was held, that the six months given to a tenant to redeem under the Irish statutes of ejectment, for non-payment of rent, are calendar months, and the day the *habere* is executed is not to be included in the calculation. 2 Bridgman's Dig. 560. Here too, the computation is from an act done, and yet to favor the right and prevent a forfeiture the day was excluded. So in the case of *Bigelow vs. Wilson*, (1 Pick. 485,) the court held, that in computing the time allowed by statute 1815, ch. 137, §51, for redeeming a right in equity sold under execution, which is "within one year after the time of executing by the officer to the purchaser, the deed thereof"—the day on which the deed is executed is to be excluded. The cases of *Lester vs. Garland*, *Dowling vs. Foxall*, and *Bigelow vs. Wilson*, are all, in principle, like the one before us: and although in the case of *Pugh vs. The Duke of Leeds*, and *The King vs. Aderly*, the first day was included—they were decided upon the general principle that has been stated, viz, that the time will be so computed as to save the right intended to be favored by the law, or to be secured by the parties to a contract. Although, therefore, the first day is included in many cases, owing to the subject matter, yet it is laid down by Mr. Chitty, (Genl. Prac. 774,) that the general rule is to exclude the first day. The policy of our law is to protect real estate from execution sale so long as the debtor has other property to satisfy his creditor; and when the sale of his land shall become necessary, the law throws guards around him to prevent a sacrifice of the estate; and after it shall have been sold, he is allowed two years to redeem it. Surely there is no right that should be more favored by the courts than this right of redemption. Without doing any injury to the purchaser, it enables the unfortunate debtor to recover his homestead, where he may have reared his family, and where may be the bones of his ancestors. If, therefore, in any case, the computation shall exclude the day, on account of the subject matter, to save the right, and prevent a forfeiture, those considerations should control in this case.

[Allen, Asher & Co. vs. Morgan et als.]

2. It is insisted, that Chalmers should have been made a party to this bill. We perceive no reason for making him a party. He had conveyed this land to the complainant long before the execution sale; and although by the statute the debtor, and not the purchaser from him, must redeem—yet when the redemption was made in the name of Chalmers, the debtor, the right thereby secured, inured to the benefit of the complainant, who, on the failure of the Bank to convey to Chalmers, has properly brought this bill to enforce a conveyance to himself. Chalmers has no legal or equitable right to the land. It is all vested in the complainant by his deed. There could not be any decree, either in favor of Chalmers or against him. It would have been improper, therefore, to have made him a party.

The decree must be reversed, and the demurrer disallowed.

ALLEN, ASHER & Co. vs. MORGAN et als.

1. /An extension of time is a good consideration to support a guaranty of the debt of another, and also deed of trust on the property of the guarantor to secure its payment.
2. A firm has the power to bind itself to pay the debts of another, and to secure the payment of such debt by the execution of a deed of mortgage or by other means.
3. A firm has the right to secure its liabilities for others, in preference to its individual creditors.

This is a bill which was filed by Allen, Asher & Co. and other judgment creditors of Hiram S. Morgan & Co. and others against them, to set aside a certain deed of trust, executed by them.

The case was heard by Chancellor McCambell, at the November term 1842; on bill, answers, replication and proof.

The Chancellor dismissed the bill, and complainant appealed.

This case was argued by *H. G. Smith and W. T. Brown*, for complainants, and by *V. D. Barry, Scarcey, Gibbs, Leath and Miller*, for defendants.

[Allen, Asher & Co. vs. Morgan et aln.]

TURLEY, J. delivered the opinion of the court.

Complainants are judgment creditors of Hiram S. Morgan, John Morgan, and Charles H. Alexander, against whom executions have been returned *nulla bona*.

Hiram S. Morgan, John H. Morgan and Charles H. Alexander, were traders under the style of H. S. Morgan & Co. John H. Morgan was also a member of another firm, known by the name and style of Morgan & Hayden. Both these firms were largely indebted to the firm of N. & J. Dick & Co., Commission Merchants of New Orleans. To secure these debts, John H. Morgan, of the firm of Hiram S. Morgan & Co., on the 1st day of November, 1837, conveyed by deed of trust of that date, certain specific property, not necessary to be mentioned, to V. P. Winchester and James T. Leath. Hiram S. Morgan also on the same day conveyed by deed certain other property to the same trustees, and upon the same trust. On the same day Hiram S. Morgan, John H. Morgan and Charles H. Alexander, composing the firm of Hiram S. Morgan & Co., executed their joint deed of trust, by which they conveyed other property, effects of the firm, to secure the same debts, a considerable portion of which, some \$19,000, was due from Morgan & Hayden, and for which it does not appear that the firm of Hiram S. Morgan & Co. was responsible until the execution of the deed of trust.

The execution of these deeds of trust is supported by a good and valid consideration, to wit, the previous indebtedness to the firm of N. & J. Dick & Co., and an extension of time by contract for its payment. There is no pretence that there is any actual fraud in the transaction; the time of extension is not unreasonable, and the amount of property secured is not equal to the amount of indebtedness. But it is contended, that the deed of trust executed by the firm of H. S. Morgan & Co. is void as against his creditors, because it is made to secure in part a large amount of debt, for which it does not appear to have been responsible—that being indebted at the time to insolvency, it is a fraud upon such creditors, to have so appropriated its effects. And the only question necessary for in-

[Allen, Asher & Co. vs. Morgan et al.]

vestigation is, whether such be the legal construction of the deed.

We do not think it is. We can recognize no difference between firms and individuals as to the power or right to bind themselves by contracts, legally made. That a firm has the power to bind itself by contract for the payment of the debt of another, has not been, and cannot be controverted. If it may do this, surely it may also do any thing else to secure an execution of the contract. It may confess a judgment upon it, which will be a lien upon the real estate of the firm, and upon which an execution may issue, which will be a lien upon its personal effects, and take the property against all who have not a superior lien, whether they be creditors of the firm collectively or of its individual members. If a firm may bind itself by contract for the debts of another, and have its effects secured and appropriated for its payment, why may it not at once secure the debt, by a mortgage or trust on the property, doing that directly which the law would do indirectly? For no reason, that we can comprehend. Is it to be said that an individual in debt shall not be allowed to become bound as security for another, because perchance his own creditors may be injured? Surely not. And yet to this we must come, were we to hold, as is contended for by the complainants; because it will not do to put it upon the ground of his being insolvent, or on the verge of insolvency, at the time he becomes so bound. This avoids voluntary conveyances, that is, conveyances unsupported by a valuable consideration. But a contract of suretyship for the debt of another then created, or upon which, in consideration of such suretyship, the time has been extended, is supported by a valuable consideration, and not void as to his creditors, either by the common law or the statute of frauds. To avoid it then, must be to introduce a new principle, that a man's own creditors are entitled to payment in preference to those created by his responsibility for others, and that they shall be postponed; and their liens, whether acquired by the judgment of the court or by deed of mortgage or trust, set aside in favor of such individual creditor, if he is otherwise to lose his debt. Then the principle will be, not that he was indebted

[Allen, Asher & Co. vs. Morgan et al.]

to the verge of insolvency at the time of the contract, but that he has become so since, and his own creditors must suffer unless they be relieved against his legal liabilities for others. There is no such refinement in the law, and there ought not to be, unless as matter of public policy, the right to become bound for another is to be entirely abolished. Such a rule would go a great way to effect it. No. The law draws no distinction between a man's creditors, whether they have become so upon contracts for his own benefit, or as surety for others. He is alike debtor in the one case and in the other; and which ever creditor by superior vigilance secures his debt to the exclusion of the other, is protected by the law in the enjoyment of this advantage. The whole misapprehension in the case is based upon the idea, that the deed of trust executed by H. S. Morgan & Co. is voluntary. This, as we have seen, is a mistake. It was made, in part, to secure a debt of Morgan & Hayden. If there had been no extension of time for the payment of this debt of Morgan & Hayden at the time the deed of trust was executed, then it would as to that debt, have been voluntary. For inasmuch as Hiram S. Morgan & Co. were not responsible for it, a promise to pay would not have been supported by a consideration.

But inasmuch as upon a contract for the extension of time to Morgan & Hayden, the firm of H. S. Morgan & Co. might have made itself a party to the debt, and responsible for its payment, as drawers or endorsers of promissory notes or bills of exchange made for that purpose, we see no reason for holding, that they may not effectuate the same intention by trust or mortgage upon its property.

We are, therefore, of opinion, that in this transaction there is no fraud, either legal or constructive, and we affirm the decree of the Chancellor.



APPENDIX.

NASHVILLE: DECEMBER TERM, 1844.

CAPLINGER *vs.* VADEN, *adm'r.*

Sullivan warranted the title of slaves to Caplinger and died. The slaves were recovered from Caplinger, Sullivan's title being adjudged invalid. It is held, that Caplinger was not a creditor of Vaden, nor his representative within the meaning of the act of 1715, ch. 48, sec. 9, until the recovery of the slaves, and that the statute of limitations began to run from that date.

Caplinger sued Vaden, administrator of W. Sullivan, in the Circuit Court of Smith county, for a breach of covenant. This suit was instituted on the 18th day of November, 1842. The declaration averred, that W. Sullivan, on the 13th day of September, 1830, by bill of sale, bargained and sold to Caplinger, a negro woman and her five children, and that he warranted the title to said slaves—that the said Sullivan was not the owner of said slaves, but that one Ann Sullivan was the owner of said slaves in remainder, after the death of said W. Sullivan—that after the death of said W. Sullivan, Ann Sullivan commenced suit against Caplinger, and recovered a final judgment against him in the Supreme Court in December, 1841, for the sum of \$6,000, dischargeable by the delivery of said slaves, and thereby obtained restoration of said slaves.

The administrator, Vaden, pleaded that W. Sullivan died on the 18th day of February, 1835—that he administered on his estate on the 1st day of October, 1835, and that plaintiff did not bring suit in the seven years after his qualification.

To this plea there was a demurrer, and joinder in demurrer.

[*Caplinger vs. Vaden, adm'r.*]

The issue was argued before Judge Caruthers, at the August term, 1844. He gave judgment for the defendant, and plaintiff appealed.

McDonald, for the plaintiff.

Guild, for the defendant.

REESE, J. delivered the opinion of the court.

This case brings before us again the construction of the 9th section of the act of 1715, ch. 48, for the limitation of actions, if such it be, against the personal representatives of deceased persons, about which, several years since, so much was written, and so little decided. The deceased, Sullivan, conveyed, in his life time, by deed, certain slaves to the plaintiff, with a covenant of warranty of title. Several years after the death of Sullivan, and after administration granted upon his estate, the slaves were recovered by paramount title asserted in due course of law, from the plaintiff, and were delivered up by him upon process issued for that purpose, a few days before the institution of this suit. Under these circumstances, the 9th section of the act above referred to was pleaded by the defendant as constituting an absolute bar to the plaintiff's action; and the Circuit Court, upon demurrer, held the plea to be good. And the question in the case is, whether in the judgment of the Circuit Court there be error or not. If this question had arisen under the act of 1789, it would have been a question already determined by the case of *Marshall vs. Hudson, administrator*, 9 Yerg. 57, presenting similar circumstances, and by other cases, upon the ground, that a party in the situation of the plaintiff was not a creditor of the defendant at the time of his death or of his representative afterwards, until the recovery and the payment of the money—and therefore not within the terms and letter of the statute at all; and if he be brought within the statute at all, it is only by an equitable construction of it, which equitable construction is not intended for the benefit of the creditor, who would not be affected by the very words of the stat-

[Caplinger vs. Vaden, adm'r.]

ute, but of the debtor and of his estate, and in favor of the bar of the statute. Subjecting the creditor, when he becomes such under such circumstances, to the equitable operation of the statute, he is entitled, certainly, to the time given by the statutes, from the period at which his cause of action commenced. And the reason or principle of this construction of the act of 1789 applies in full force to the act of 1715, perhaps more strongly, for that requires the creditor of the decedent to present his claim, if that means suit, within seven years after the death of the debtor; now there might not, for seven years, be any representatives? So this statute as much calls for an equitable construction, so to speak, as the act of 1789.

The judgment will be reversed, and the case remanded to be proceeded in.



INDEX.

ACCOMPLICE.

An accomplice who testifies to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by defendant, though made at the same time and in the same conversation. *Kinchelow vs. The State*, 9.

ACKNOWLEDGMENT.

When a deed is acknowledged, its execution is acknowledged on the day it bears date, and a registered copy of such deed is *prima facie* evidence of said execution on such day. *Owen vs. Owen*, 352.

ADMINISTRATOR.

1. A judgment by default or by false plea against an administrator, is an admission of assets at common law, which cannot afterwards be denied. *Mosier, adm'r. vs. Zimmerman*, 62.
2. But now by statutes of Tennessee the administrator may at any time before his personal liability is fixed by a judgment against him individually, enjoin all judgments against him as administrator, and have a *pro rata* distribution of the assets of the estate if it be insolvent. *Ibid.*
3. The act of 1794, ch. 5, sec. 1, authorizing administrators and executors to convey land, sold by decedent, in conformity to the bond given for title, does not dispense with the necessity of making the heirs parties to a bill for title, where the personal representatives have failed or refused to convey. *Hale vs. Darter & Thompson*, 79.
4. A joint action lies, by statute law, against surviving
80—VOL. V.

ADMINISTRATOR—*Continued.*

obligor, and the personal representative of a deceased obligor, and it makes no difference whether the surviving obligor or some third person be the representative. *Taylor vs. Taylor et als.* 110.

5. An administrator is bound to act on the legal rights of his intestate. *Crippen, guardian, vs. Bearden & Odell*, 129.

See DEVISE.

6. No decree can be regularly rendered against an administrator *de bonis propriis* on a bill filed against him in his representative character not suggesting a *devastavit*.—*Dance vs. McGregor*, 428.
7. A decree rendered against an administrator *de bonis propriis* after the administrator has filed his bill under the act of 1837, suggesting the insolvency of the estate, is erroneous, and will be reversed on bill of review. *Ibid.*
8. Distributees may recover slaves illegally sold by the administrator. But the administrator cannot avoid his own sale, and the distributees are, therefore, not affected by his failure to sue within the time prescribed by the statute of limitations. *Herron vs. Marshall*, 443.
9. An administrator is bound to use due diligence in the collection of debts due the estate, and if debts are lost by his failure to sue in due time, he is responsible personally to the distributees. *Perry vs. Wooton*, 524.
10. If distributees agree that an administrator may indulge the debtors to the estate, and by such indulgence the debts are lost, they have no right to complain. *Ibid.*
10. The fact, that an administrator regarded himself personally liable, and expressed himself to that effect, would not change the facts, nor constitute a liability which the law did not raise upon the facts of the case as exhibited in proof. *Ibid.*
11. An agreement by indenture was made by an administrator and the widow of intestate, by which the administrator relinquished title to certain slaves to the widow, upon consideration, that she relinquished her interest in the balance of the estate. Held, that this was not a distribution, but a sale of the slaves, which was void under the act of 1827, ch. 61. *Bryan vs. Martin, ex'r.* 565.

ADMINISTRATOR—*Continued.*

12. Sullivan warranted the title of slaves to Caplinger and died. The slaves were recovered from Caplinger, Sullivan's title being adjudged invalid. It is held, that Caplinger was not a creditor of Vaden, nor his representative within the meaning of the act of 1716, ch. 48, sec. 9, until the recovery of the slaves, and that the statute of limitations began to run from that date. *Caplinger vs. Vaden, adm'r.* 630.

See EXECUTOR.

AFFIDAVIT.

See CONTINUANCE.

AGENT.

1. An agent cannot bind his principal by writing under seal, unless he act by virtue of an authority under seal, and no previous parol assent or subsequent parol adoption will sustain the act of the agent. *Boyd vs. Dodson*, 36.
2. Where an agent was vested with power to sell personal property for the best price he could procure, a sale on credit was within the range of his discretion, and if made in good faith, and in accordance with the course of trade at the place where the sale was made, would be valid. *May vs. Mitchell*, 365.

AGREEMENT.

1. See VENDOR and VENDEE, USURY.
2. By the act of 1801, ch. 25, sec. 1, a promise to be bound for the debt, default or miscarriage of another, must be in writing: the consideration of such promise need not be in writing to make it a valid agreement. *Taylor vs. Ross*, 3 Yerg. 333. *Gilman vs. Kibler*, 19.
3. To render one responsible for the debt of another, the consideration passing between the original parties to a previous agreement, is not sufficient. There must be a new consideration passing between the new parties. *Ibid.*
4. An agreement to forbear suit is a good consideration; but where the party sought to be charged, merely wrote a letter to the creditor, stating that if he required a surety he was willing to be bound, but no acceptance of him as such took place: It is held, there was no agreement to

AGREEMENT—Continued.

forbear and no consideration passing between the parties. *Ibid.*

AMENDMENT.

An amendment of a plea in abatement as to matter of form, or refusal so to do, is not error for which the supreme court will reverse. The decision of such questions belongs to the discretion of the circuit judge. *Helm vs. Rodgers*, 105.

ANSWER.

See PLEADINGS IN CHANCERY.

ASSETS.

See ADMINISTRATOR.

ASSUMPSIT.

1. An action for money had and received does not lie to recover back money paid on a contract, unless there be a total failure of consideration. It does lie where the vendor of personal property had no title to the property sold. In such a case there is a total failure of consideration. *Charlton vs. Lay*, 496.
2. Where the defendant received an execution in payment for a horse by him sold: It is held, that in a suit brought against him for the consideration received, he could not urge that the execution received by him had been discharged by a previous levy, he having collected the money thereupon. *Ibid.*
3. Where a bond for title to real estate was executed, and a bill single executed for the consideration, the defence of a want of title to the land sold, could not be set up against the bill single by the vendee: *A fortiori*, could not such vendee discharge the bill single, and recover back the money paid by action of assumpsit. The remedy is on the bond for title. *Coleman vs. Sanderlin*, 562.

AWARD.

In an action on an award any material variance between the terms of the submission averred in the declaration, and that offered in proof, will be fatal; *ex. gr.*, where the declaration averred an agreement to abide by and perform the award, and the proof showed an agreement,

AWARD—Continued.

that the award should be made the judgment of the court. *Smith vs. Crosswhite*, 59.

BANK NOTES.

1. See **MONEY**.
2. The date of a bank note furnishes no presumption that it was put in circulation at that time. *Greer vs. Perkins*, 588.

BANKRUPTCY.

1. A decree of bankruptcy against a debtor vests his equities of redemption in the assignee, and no right of redemption arises from a deposit of money by a creditor in the hands of the Clerk, or a tender to the debtor, after such decree. *Pillow vs. Langtree*, 389.
2. A judgment by confession is not void because it was confessed only ten days before the filing a petition by defendant to be declared a bankrupt. It must have been confessed in contemplation of bankruptcy, voluntary, and with the view of giving a particular creditor a preference over the general creditors. *Taylor & Blackmore vs. Whithorn*, 340.
3. Where a defendant confessed judgment after suit instituted and stipulated for delay, the confession, under such circumstances and stipulation for delay, repel the conclusion that such confession was voluntary or made with a view to prefer such creditor. *Ibid*.

BASTARDY.

In proceedings against the father of a bastard child, to render him responsible under the provisions of the act of 1741, ch. 14, for its maintainance, it must appear of record that the child was born in the county in which the proceedings are instituted. *Edmonds vs. The State*, 94.

BOND.

1. See **DELIVERY** and **ESCROW**.
2. A bond given to an officer to procure him to do an illegal act, and to indemnify him against the consequences thereof, is void if its illegality were known to the officer at the time of the execution of said bond: *secus* if it were unknown. *Hunter & Baker vs. Agee*, 57.

BOND—Continued.

3. A bond given to an officer after the commission of a misdemeanor to indemnify him against the consequences thereof, is valid. *Ibid.*

BOND, ADMINISTRATOR'S.

See ADMINISTRATOR: EXECUTOR.

BOND, GUARDIAN'S.

See SURETIES.

BOND FOR TITLE.

1. Where a bond for title to real estate was executed, and a bill single executed for the consideration, the defence of a want of title to the land sold, could not be set up against the bill single by the vendee: *A fortiori*, could not such vendee discharge the bill single, and recover back the money paid by action of assumpsit. The remedy is on the bond for title. *Coleman vs. Sanderlin*, 562.
2. The act of 1794, ch. 5, sec. 1, authorizing administrators and executors to convey land, sold by decedent, in conformity to the bond given for title, does not dispense with the necessity of making the heirs parties to a bill for title, where the personal representatives have failed or refused to convey. *Hale vs. Darter & Thompson*, 79.

BOND, REFUNDING.

See DELIVERY.

BOND, SHERIFF'S.

See SHERIFF.

BOWIE KNIFE, CARRYING.

The provision of the act of 1837-8, ch. 137, sec. 2, which directs the imprisonment of persons convicted of wearing concealed under their clothes knives, which in form, shape or size, resemble Bowie knives, is not void on the ground, that it is too indefinite to be safely executed. The intent of the statute was to prevent the destruction of human life by the use of heavy and dangerous knives, and it is the province of the judge and jury to determine what description of knives are embraced by the spirit of the statute. *Haynes vs. The State*, 120.

CASE.

See MASTER and SERVANT: MALICIOUS PROSECUTION: FRAUD.

CERTIORARI.

1. A writ of *certiorari* is a substitute for an appeal. See *Rogers vs. Jewell*, 10 Yerger, 254. *Burt vs. Davidson*, 425.
2. A party is entitled to a writ of *certiorari* where he failed to give an appeal bond within the two days prescribed by statute, in consequence of a remark of the Justice of the Peace before whom the case was tried, that it could be done at a later period. *Smith vs. White*, 46.

CHAMPERTY.

1. If it appear to the court in any way, that a suit in its inception or progress is infected by champerty, it is the duty of the court to dismiss the suit. The statute authorizing a proceeding by bill or by interrogatories propounded, was not intended to restrict, but to amplify the remedies. *Webb vs. Armstrong*, 379.
2. A champertous agreement made by one of the complainants for the others to prosecute the suit, affects the interest of all. The suit is an entire thing, and being tainted by champerty as to the interest of one, must be dismissed. *Vincent vs Ashley*, 593.

CHANCERY JURISDICTION.

1. The fact that the second endorser received half of the proceeds of a discounted note by previous agreement, is a good defence to that extent in law or equity, for the first against the second endorser. *Galbraith vs. Martin & Findley*, 50.
2. Where a defence may be made, either in law or equity, and in the suit at law the defendant does not make it, he loses his right to enforce his defence in equity; yet if the defendant in equity does not object to the want of jurisdiction, but answers over to the merits, he waives the objection, and the court will act on the defence. *Ibid.*
3. To distribute insolvent estates amongst creditors. 62.
4. Though a surety has a right to bring his principal and the creditor into a Court of Chancery to compel the payment of the debt, yet before loss incurred or payment

CHANCERY JURISDICTION—*Continued.*

- made, he has no right to come into a Court of Chancery to set aside a fraudulent conveyance on the ground of apprehending loss. See 3 Hump. 543: 1 Story Eq. sec. 327. *Williams et als. vs. Tipton et als.* 66.
5. A Court of Chancery will not take jurisdiction to try a naked question of boundary. See *Cooke vs. Hickman*, 3 Hump. 643: 2 John. Ch. Rep. 519. *Hale vs. Darter & Thompson*, 79.
 6. To decree an account against a public officer and his sureties. *Governor vs. McEwen et als.* 241.
 7. To decree partition, 310, 404.
 8. The jurisdiction of the Chancery Court, to decree a sale of the real estate of a deceased person for the satisfaction of his debts, will not be defeated on the ground, that the bill is not filed in the Chancery district in which the land lies, if the court have jurisdiction on general chancery principles, independent of the special jurisdiction conferred by the statute on the ground of the location of the lands. *Britain vs. Cowen*, 315.
 9. If an executor fails or refuses to proceed to obtain the assent of the State to the emancipation of a slave in accordance with the will of the testator, a Court of Chancery will compel the execution of the trust. *Howard et als. vs. Clemmons et als.* 368.
 10. Where an unjust judgment has been recovered, and it does not clearly appear to the court that a defence could have been made by proper plea at law, relief will be granted in chancery. *Mcuborn vs. Glass, adm'r.* 520.
 11. To decree specific execution of contracts, 529.
 12. A Court of Chancery has jurisdiction to award a writ of possession for land where a controversy about the title has been properly brought into the court. *Irvine's heirs vs. McRee et als.* 554.
 13. A Court of Chancery has no power to restrain the purchaser of real estate from selling it without announcing the existence of the lien. It can do nothing in the premises except order a sale of it in the hands of vendee or assignee with notice, for the satisfaction of the purchase money. *Taylor vs. Hunter & Searcy*, 569.
 14. Where complainant signed a bill single as a surety on

CHANCERY JURISDICTION—*Continued.*

the faith of a promise of the principal that he would confess a judgment and have it stayed by a responsible man; it is held, that the failure of the principal to fulfil this promise constituted no ground of equitable relief. *Carpenter vs. Kee et al.* 585.

15. To dismiss suits affected by champerty, 593.
16. To enforce redemption and re-conveyance—See **REDEMPTION**.
17. To set aside fraudulent conveyances—See **FRAUDULENT CONVEYANCES**.
18. To decree a sale of mortgaged property, though there be a trustee to sell, 612.
19. To establish the validity or invalidity of devises. *Green vs. Allen*, 232.
20. To construe wills at the instance of the executor. *Booker vs. Booker*, 512.
21. The allegation of matter fit for the cognizance of a Chancery Court, which is not proved, will not give such court jurisdiction of matters belonging to a court of law. *McGuire vs. Caruthers' adm'r. et als*, 414.
22. To enforce lien on real estate—See **LIEN**.

CHANCERY SALE.

Whether a sale in Chancery will be set aside upon the offer of a larger sum, rests in the discretion of the Chancellor, which the court will not attempt to control, except in case of palpable error. It is the duty of the Chancellor to see that sales are conducted fairly, and under circumstances calculated to bring the highest prices. *Owen vs. Owen*, 352.

CHARITY.

See **DEVISE**.

CHARGE OF THE COURT.

1. Where justice has been done in the trial below, and the court see from the record of the suit that a second trial would inevitably end in the same result, the court will not grant a new trial, though the circuit judge may have improperly assumed the existence of facts in his charge to the jury. *Graham et al. vs. Bradley*, 476.
2. The assumption of facts by the circuit judge as proved, 81—VOL. V.

CHARGE OF THE COURT—*Continued.*

which were proved, and about the truth of which there was no controversy, is not an invasion of the province of the jury, for which the court would reverse the judgment of the circuit court. *Farquhar vs. Toney*, 502.

COMPROMISE.

Where a compromise of controverted rights is entered into, if both parties are in equal ignorance of the true state of those rights, such compromise is valid; and this whether the doubt rests upon a matter of fact or of law. *Trigg vs. Read*, 529.

CONSIDERATION.

1. See ASSUMPSIT: AGREEMENT: USURY.
2. An extension of time is a good consideration to support a guaranty of the debt of another, and also a deed of trust on the property of the guarantor to secure its payment. *Allen, Asher & Co. vs. Morgan et als.* 624.

CONSTABLE.

1. In a case of motion against a constable before a justice of the peace for the non-return of an execution, it must appear that the notice was served five days before trial, or that the defendant waived his right to notice by appearance and defence. *Burt vs. Davidson*, 425.
2. The judgment against a constable by motion before a justice of the peace, for non-return of an execution, must recite the judgment on which the execution issued. *Ibid.*
3. A judgment by motion against a constable before a justice of the peace, was as follows: "It is considered by the court, that Willis Burt recover a judgment against James Davidson and John Adkins and S. H. Lokey, his sureties, the said sum," &c. Held, that this did not sufficiently aver the suretyship of the defendants Adkins and Lokey. *Ibid.*

CONSTITUTIONAL LAW.

1. An act of the Assembly appointing trustees to receive a donation on behalf of an unincorporated association after the death of the donor, is unconstitutional, void, and vested the trustees with no rights. *Green et als. vs. Allen et als.* 170.
2. The Legislature of the State, in the absence of consti-

CONSTITUTIONAL LAW—*Continued.*

tutional prohibition, has the supreme and unrestricted control over the property and money of the State, and when they, or either of them, are in the hands of a citizen, it has the power to dismiss or compromise suits instituted for the recovery thereof according to its own sense of the interest of the State and right to the citizen, and this power may be delegated. *The Governor et als. vs. McEwen and sureties*, 241.

3. A resolution of the legislature, appointing commissioners to settle and compromise a suit against the sureties of the Superintendent of Public Instruction, "upon principles of right and justice towards the sureties, and to the best interest of the school fund," and directing that the report of said commissioners should be made the judgment of the court in which the suit was depending, is not in violation of the 10th section of the 11th article of the Constitution of the State. *Ibid.*
4. The board of commissioners of school funds have the power to make all contracts in reference to the school fund, not prohibited by law, and may compromise a doubtful claim for the better security of the fund, yet it being a public corporation, subject to legislative modification or total repeal, the vesting it with such power, does not deprive the legislature of a similar power, when it may choose to exert it by act or resolution. *Ibid.*
5. Where justice has been done in the trial below, and the court see from the record of the suit that a second trial would inevitably end in the same result, the court will not grant a new trial, though the circuit judge may have improperly assumed the existence of facts in this charge to the jury. *Graham et als. vs. Bradley*, 476.
6. The assumption of facts by the circuit judge as proved, which were proved, and about the truth of which there was no controversy, is not an invasion of the province of the jury, for which the court would reverse the judgment of the circuit court. *Farquhar vs. Toney*, 502.
7. A mandate of the legislature to the judiciary, directing what construction shall be placed on existing statutes, is an assumption of judicial power, and unconstitutional. *The Governor vs. Porter and sureties*, 165.

CONTINUANCE.

1. The supreme court will not reverse the judgment of the circuit court, on the ground of a refusal to continue, unless in case of palpable mistake, without the correction of which, injustice must necessarily be done. *Bellew vs. The State*, 567.
2. If an affidavit for a continuance be not full, satisfactory and direct as to material allegations necessary for a continuance, exhibiting palpable error in a refusal of the judge to continue the case, the court will not reverse for such refusal. *Knight vs. The State*, 599.

CONTRACT.

1. See AGREEMENT: VENDOR and VENDEE.
2. A verbal contract for the sale of real estate is void, and can be made valid by no act of part performance. Money paid on such contract, is regarded as a mere deposit for the use of the party paying it. *Crippen vs. Bearden & Odell*, 129.

CORPORATION.

1. When a corporation is dissolved or expires, its personal estate vests in the State, its real estate reverts to the original grantor and his heirs, and the debts due to and from it are extinguished. *White vs. Campbell et als.* 38.
2. Where a note was executed to a defunct corporation, and a deed of trust to secure such debt, the note and deed are both void, the first for the want of a payee, and the last for the want of a *cestui que trust*. *Ibid.*
3. The board of commissioners of school funds have the power to make all contracts in reference to the school fund, not prohibited by law, and may compromise a doubtful claim for the better security of the fund, yet it being a public corporation, subject to legislative modification or total repeal, the vesting it with such power, does not deprive the legislature of a similar power, when it may choose to exert it by act or resolution. *The Governor et als. vs. McEwen and sureties*, 241.
4. The corporation of a town may be indicted and fined for permitting the streets to remain out of repair, but the officers of the corporation are not individually responsible for such nonfeasance. *The State vs. Barksdale, Mayor, &c.* 154.

CORPUS DELICTI.

See **LARCENY.**

COSTS.

1. By the practice in this State, a judgment is given generally for costs. The costs are fixed by law, and when taxed by the clerk and the amount ascertained, the judgment rendered is a judgment for that amount. *Gillet & Franklin vs. Boadman*, 44.
2. The prosecutor is no party to the cause, and is not liable in any case for costs, unless it be so directed by statute. *Hansard vs. The State*, 115.

COVENANT.

1. In covenant where defendant pleads covenants performed, the plaintiff must prove the amount of damages, and can only recover the amount proved. *Baker vs. Jordan*, 485.
2. Where in covenant there was a plea of covenants performed, and no proof was introduced except a note for dollars payable in current bank notes, it is held that the jury are warranted in giving a verdict for the number of dollars called for in the note. *Ibid.*
3. The plea of covenants performed, admits the due execution and acknowledgment of a Sheriff's bond in accordance with statutory provisions. *The Governor vs. Organ's sureties*, 161.

DEED.

See **BOND, DELIVERY: ACKNOWLEDGMENT: REGISTRATION.**

DELIVERY.

1. A delivery of a refunding bond to a Clerk of the Chancery Court in the street, is a good delivery. It is not necessary to its validity that it should have been delivered in his office, or that all the signers should have been present at its delivery, or acknowledged it before him at any time. *Hansard et als. vs. Bank of Tennessee*, 53.
2. Where a bill single was delivered to the creditor by an obligor as surety, upon condition that another should sign as co-surety, it was delivered as an escrow, and is not obligatory unless the condition be complied with, or

DELIVERY—*Continued.*

unless he agreed that it should be obligatory on him after his knowledge of the refusal of the other to sign as co-surety. *Perry vs. Patterson*, 133.

3. Where a bill single was delivered as an escrow by a surety to the principal obligor and by the principal obligor to the creditor absolutely and without condition, the ignorance of the creditor does not discharge the condition and constitute the delivery a valid absolute delivery. It was the business of the creditor to have informed himself of the facts connected with the delivery. *Ibid.*
4. Where a deed of gift was found amongst the papers of a dead man, executed by him and witnessed; it is held, that these facts alone would not constitute sufficient evidence of a delivery to perfect the title of donee. There must have been acts and declarations of the deceased, showing that he regarded the signature and witnessing of the deed as passing the title. *Martin, adm'r. vs. Ramsey et als.* 349.
5. No formal or ceremonious delivery of a deed of conveyance is necessary: if no condition be annexed and nothing remains to be performed in order to give effect to a deed of conveyance, its signing, sealing and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor. *Farrar vs. Bridges*, 411.
6. When a deed of conveyance was made, absolute on its face, but a bond given, binding the vendee to divide the estate equally with the brothers and sisters of the vendee, and the bond was delivered to the vendee: It is held the delivery to the vendee was for the benefit of the brothers and sisters, and was a part of the contract of conveyance. Such bond could not be surrendered without the consent of those for whose use it was made. *Graham et als. vs. Lambert et als.* 595.

DRUNKENNESS.

1. It is competent to discredit a witness, by proving that he was drunk at the time of the transaction he attempts to relate took place. The large quantity of liquor drank is a circumstance tending to prove drunkenness, and as such, is competent evidence to prove that fact. *Fleming vs. The State*, 564.

DRUNKENNESS—*Continued.*

2. A single act of open public notorious drunkenness is not indictable. *Hutchison vs. The State*, 142.
3. A charge of drunkenness on a specified day and on divers other days and times not specified, is legally a charge of a single act of drunkenness. *Ibid.*

DEVISE.

1. A devise "to the Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said Conference and the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom," is held inoperative and void, and cannot be sustained by a Court of Chancery in Tennessee, because such devise exhibits only a general indefinite purpose of charity, both as to persons and objects. *Green et als. vs. Allen et als.* 170.
2. See **LIMITATION ON ESTATES.**

DOWER.

1. Where vendee registered his deed for land after the death of vendor, and not before, it is held, that the vendor did not die seized and possessed of the land, and that his widow was not dowable of such land. *Chester et al. vs. Greer et al.* 26.
2. Dower is connected with and inheres in the title of the heirs, and that which bars the right of the heirs bars the widow's right to dower. *Carmichael vs. Carmichael et al.* 96.
3. Where the land of the deceased husband was sold under a void judgment and the possession voluntarily relinquished by the widow, who failed to assert her right to dower by suit for twenty years, it is held that she had lost her right. *Ibid.*
4. A widow is not a competent witness in a suit by the heir for a portion of the real estate of her deceased husband, where a recovery by the heir would increase her dower interest, or a loss reduce it. *Wade et ux. vs. Johnson*, 117.

ELECTIONS.

1. Betting upon the result of the Presidential election in the United States, is within the letter and meaning of the act of 1823, ch. 25, sec. 2, and indictable. *Quarles vs. The State*, 561.
2. In order to constitute a wager, there must be a risk by both parties. *Ibid.*

EMANCIPATION.

1. Two things are necessary to secure the emancipation of a slave, the assent of the master, and the assent of the State, each expressed according to law. *Howard vs. Clemmons*, 368.
2. If an executor fails or refuses to proceed to obtain the assent of the State to the emancipation of a slave, in accordance with the will of the testator, a Court of Chancery will compel the execution of the trust. *Ibid.*
3. Where an executor fails to proceed to obtain the assent of the State to the emancipation of a slave, the delay furnishes no ground for a bill for distribution of the slaves as the property of the distributees, nor for a bill for an account of the value of their labor from the death of their testator. *Ibid.*

ENDORSER.

See NEGOTIABLE PAPER.

ENTRY.

All lands held by entry are subject to execution at law by the act 1794, ch. 5. *Heffly vs. Hall*, 581.

EXECUTION.

1. If personal property be sold by the Sheriff or other officer without such property being present at the time and place of sale, the sale is void, unless the execution debtor shall waive the necessity of its presence. *Gift vs. Anderson*, 577.
2. Notice of the sale of real estate, of which the execution debtor is not in possession, need not be given under the act of 1799. *Farquhar vs. Toney*, 502.
3. See SHERIFF: REDEMPTION: ENTRY.

ESCROW.

See DELIVERY.

EXECUTOR.

1. The assent of an executor to a legacy must be obtained before it can be legally reduced to possession by the legatee; but this assent need not be expressly proved. It may be inferred from the circumstances attending the transaction, and this as well where the executor is legatee as where he is not. *Greenway et al. vs. Greer et al.* 26.
2. The statute of limitations does not run in favor of an express trustee against *cestui que trust*. It is otherwise as to trustees by operation of law. *Haynie et als. vs. Hall ex'r. et als.* 290.
3. Where an executor paid over money due legatees to a third person, such person held the money as trustee by operation of law, and the statute of limitations applied. *Ibid.*
4. If an executor fails or refuses to proceed to obtain the assent of the State to the emancipation of a slave, in accordance with the will of the testator, a Court of Chancery will compel the execution of the trust. *Howard et als. vs. Clemmons et als.* 308.
5. Where an executor fails to proceed to obtain the assent of the State to the emancipation of a slave, the delay furnishes no ground for a bill for distribution of the slaves as the property of the distributees, nor for an account of the value of their labor from the death of their testator. *Ibid.*
6. Joint executors, executing a joint bond with sureties, are each responsible to creditors and distributees for the defalcation of the other before the sureties. *Hughlett vs. Hughlett et als.* 453.
7. The sureties of an executor are not responsible for the proceeds of the sale of real estate directed to be sold by testator before the act of 1837-8. *Ibid.*
8. Where real estate was devised to the executor as a compensation for the trouble of executing the trusts of the will, it is held that the devise vested on the qualification of the executor. *Booker vs. Booker*, 505.
9. See ADMINISTRATOR: DEVISE.

EVIDENCE, QUESTIONS OF, AT LAW.

1. Evidence of a distinct substantive offence shall not be admitted in support of another offence: *a fortiori* shall
82—VOL. V.

EVIDENCE, QUESTION OF, AT LAW—*Continued.*

not evidence of an intention to commit another offence be received. *Peek vs. The State*, 2 Hump. 86: 4 Hump. *State vs. Stone*, 9.

2. An accomplice who testifies to the defendant's guilt cannot be permitted, with a view to sustain his testimony, to narrate other instances of crime proposed to him by defendant, though made at the same time and in the same conversation. *Ibid.*
3. The credibility of a witness is a question of fact to be decided by a jury; not by the number who may testify for or against his credibility, but by their respectability, intelligence, consistency and means of information. *Norris vs. State*, 3 Hump. 335. *Ibid.*
4. Horses were conveyed by deed of trust, and described in the following language: "Twenty-five head of horses:" Held, that this description was sufficiently specific to be valid; and that parol proof was admissible to identify them. *Barker vs. Wheelip*, 329.
5. The fact of the delivery of a notice to an endorser, like other facts, may be inferred by circumstances, and the taking an indemnity after protest, is a circumstance going to sustain such fact, and admissible evidence. *Ross et als. vs. Planters' Bank*, 335.
6. Before secondary evidence be admissible, it must appear that the primary evidence was not procurable. *Sims et als. vs. Sims et als.* 370.
7. Conduct exhibiting satisfactory indications of guilt, is not sufficient to sustain a conviction, unless there be also satisfactory evidence that a crime has been committed; as in case of alledged larceny, that the property has been feloniously taken and carried away. *Tyner vs. The State*, 383.
8. A mere declaration in evidence that a horse has been stolen, is not sufficient evidence of the *corpus delicti*. The facts must appear so that the judge and jury may see whether those facts in point of law amounted to a feloniously taking and carrying away of the property in question. *Ibid.*
9. It is competent to discredit a witness, by proving that he was drunk at the time the transaction he attempts to relate took place. The large quantity of liquor drank

EVIDENCE, QUESTION OF, AT LAW—*Continued.*

- is a circumstance tending to prove drunkenness, and as such, is competent evidence to prove that fact. *Fleming vs. The State*, 564.
10. It is necessary to the official validity of a notary's certificate, that it appear by its date to be made out on the day of notice given. *Union Bank vs. Holcomb*, 583.
 11. The date of a bank note furnishes no presumption that it was put into circulation at that time. *Greer vs. Perkins*, 588.
 12. When a deed is acknowledged, its execution is acknowledged on the day it bears date, and a registered copy of such a deed is *prima facie* evidence of its execution on such day. *Owen vs. Owen*, 352.

EVIDENCE, QUESTIONS OF, IN CHANCERY.

1. An answer is evidence against the party making it without the production of the bill, if the answer be not responsive to the bill, but sets up new matter in defence. *Wallen vs. Huff*, 91.
2. The bill charged, that an alleged deed, on which the defendant rested his defence, had no valid existence. The answer averred the existence and validity of the deed. Held, that this state of pleadings did not dispense with the necessity of defendant's proving affirmatively the existence and validity of such deed. *Sims vs. Sims*, 370.
3. An objection by a defendant in Chancery, to the testimony of a co-defendant, may be waived, by the mode of his cross-examination of such defendant. *Bailey & Cochran vs. Cooper et als.* 400.
4. An allegation in an answer, which is not responsive to the bill, is not evidence for defendant, and the *onus probandi* is on the defendant to establish it. *Davis & Richardson vs. Clayton, Wills et als.* 446.
5. An attachment bill charged, that defendant held a note given by Black & Morton to Wills, the judgment debtor. Defendant answered, that he had the note, but that the title to the note was in him by prior assignment. Held, that this allegation of ownership was not responsive to the bill, and not evidence for the defendant. *Ibid.*
6. Where an attachment bill charged one of the defend-

EVIDENCE, QUESTION OF, IN CHANCERY—*Continued.*

ants with being the depositary of a promissory note, the allegations in the answer of such defendant, as to the title to said note, would not be evidence for a co-defendant. *Ibid.*

7. Evidence, circumstantial, 145, 155.

FEE SIMPLE.

To create an estate in fee simple, the land must be conveyed to the purchaser and *his heirs*. Where it is conveyed to the purchaser alone, a life estate alone is created. *Hunter vs. Bryan et als.* 47.

FORCIBLE ENTRY AND DETAINER.

A defendant in an action of forcible entry and detainer cannot dispense with the necessity of giving bond and security for rent, as required by the act of 1842, ch. 186, by taking the pauper's oath. *Norton vs. Whitesides*, 381.

FRAUD.

1. Where the vendor procured the rescission of a contract for the sale of real estate by withholding from the vendee information of the validity of his title, this is declared direct fraud, and the contract of rescission pronounced void. *Trigg vs. Read*, 529.
2. In all cases of fraud, and damages resulting immediately therefrom, an action lies at the suit of the party injured. *Allison vs. Tyson*, 449.
3. See MORTGAGE.

FRAUDULENT CONVEYANCE.

1. A creditor must establish his claim by judgment before he is in a situation to impeach the validity of a conveyance for fraud. *Chester vs. Greer et al*—26. *Williams et al. vs. Tipton et al.* 66.
2. Though a surety has a right to bring his principal and the creditor into a Court of Chancery to compel the payment of the debt, yet before loss incurred or payment made, he has no right to come into a Court of Chancery to set aside a fraudulent conveyance on the ground of apprehended loss. See 3 Hump. 543: 1 Story Eq. sec. 327. *Ibid.*
3. A judgment creditor has a right in equity to set aside a

FRAUDULENT CONVEYANCE—*Continued.*

- fraudulent conveyance, and a surety who has satisfied a part of the judgment of such creditor, shall be substituted to the rights of such judgment creditor, to the extent of his payment. 12 Wheaton, 557. *Ibid.*
4. A complainant will not be permitted to question the right of judgment creditors to sell the debtor's estate, where it appears that complainant's claim originated in fraud. *Taylor vs. Harwell et als.* 331.
 5. If a deed of trust, containing articles consumable in the use, stipulate that the vendor may use them, such deed is fraudulent and void. *Charlton vs. Lay*, 496.
 6. When a deed of trust contained articles consumable in the use, but no stipulation that vendor might use or consume them, and the vendor, with the assent of the beneficiary, consumes them, such fact is an indication of fraud proper for the consideration of the jury in connexion with the evidence in the case. *Ibid.*
 7. A deed of trust which gave the debtor five years to pay a debt of \$100,000, such debtor paying \$20,000 annually, with interest from the date, and in default of payment the trustee to sell, is held not to be fraudulent on its face. *Bennet vs. Union Bank*, 612.
 8. A debtor in failing circumstances may prefer one creditor to another, or secure his debt in preference to that of others; but he cannot cover a much larger amount of property than will satisfy the debt, and postpone for an unreasonable length of time its appropriation. In such case it hinders and delays other creditors from having the surplus applied to the payment of their debts. *Ibid.*
 9. An extension of time is a good consideration to support a guaranty of the debt of another, and also deed of trust on the property of the guarantor to secure its payment. *Allen, Asher & Co. vs. Morgan*, 624.
 10. A firm has the power to bind itself to pay the debts of another, and to secure the payment of such debt by the execution of a deed of mortgage or by other means. *Ibid.*
 11. A firm has the right to secure its liabilities for others, in preference to its individual creditors. *Ibid.*
 12. The failure to register a deed makes it void, as to creditors, by statute. No one, however, can be regarded as

FRAUDULENT CONVEYANCE—*Continued.*

a creditor till he has established his claim by a judgment, and no deed can be questioned for want of registration or for fraud but by a judgment creditor. *Chester vs. Greer*, 26.

GAMING.

1. If a party plays at a game, knowing that others are betting, he is guilty of gaming under statutes passed to prohibit gaming. *Smith vs. The State*, 163.
2. See **ELECTIONS**.

GARNISHMENT.

See **CHANCERY PLEADINGS**.

GUARDIAN.

1. The father as natural guardian of his children has no right to intermeddle with their estate. *Haynie vs. Hall*, 290.
2. A decree against an heir, who was a minor, for the sale of lands, for the satisfaction of debts of deceased, is not void on the ground, that the heir was not served personally with process: it is sufficient if he be made a party by the bill and service of process and copy on the regular guardian. *Britain vs. Cowen*, 315.
3. Minors may maintain an action of trover by their next friend, but he is not entitled to receive the money recovered. It will be ordered to be paid into court, subject to the demand of a legally constituted guardian. *Benton vs. Pope*, 392.
4. See *Bond vs. Ray*, 492.

HUSBAND AND WIFE.

1. Where a wife joins her husband in the sale of her real estate without an agreement in reference to the proceeds of the sale, the proceeds vest absolutely in the husband. *Chester vs. Greer*, 26.
2. A husband who is not indebted, may lawfully vest money in property in trust for the separate use of his wife. *Owen vs. Owen*, 352.
3. A deed conveying a slave to the wife, by a husband or other person, is a deed for personal estate, which by the act of 1831, ch. 90, is required to be registered in the

HUSBAND AND WIFE—*Continued.*

county where the person executing it lived at the time of its execution. *Ibid.*

4. Where the wife dies without issue the husband has no claim against those who inherit her real estate for the value of improvements placed on it, though made with her assent and approbation. *Marable vs. Jordan*, 417.
5. Slaves conveyed in trust to Thomas and his wife Elizabeth during their joint lives, are subject to the debts of the husband during his life. *Mayberry vs. Neely et als.* 337.
6. Where property is conveyed in trust for the benefit of the wife, it enures to the benefit of the husband, unless it be conveyed to the sole and exclusive use of the wife by express words. *Ibid.*

IMPRISONMENT.

Where the statute directs that a defendant on conviction shall be fined and imprisoned, and the Circuit Court on conviction fined the defendant, but failed to direct the imprisonment, the Supreme Court will, under the provisions of the act of 1809, ch. 49, order the imprisonment. *Sword vs. The State*, 102.

IMPROVEMENTS.

See HUSBAND and WIFE No. 4.

INDICTMENT.

1. An indictment for selling by false weights must specify the person to whom the sale was made. It is not sufficient to charge, that defendant sold to "divers persons." *The State vs. Woodson*, 55.
2. An indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof. *Hurrell vs. The State*, 68.
3. The forms of judicial proceedings both in civil and criminal cases are established by the courts of justice, and must from time to time be so modified, changed and applied, as to subserve the ends of justice, and the safety of the citizen. *Lamden vs. The State*, 83.
4. A bill of indictment for perjury, framed upon a false oath taken in proceedings in Chancery, need not set forth at large the bill in Chancery and other proceedings con-

INDICTMENT—*Continued.*

- nected therewith. It is only necessary to set forth by description and averment so much of the proceedings as will make manifest the materiality of the oath taken. *Ibid.*
5. In a case of misdemeanor where the allegations of the indictment necessarily involve a negative of the words of the statute creating the offence, the indictment is good. See *Peek vs. The State*, 2 Hump. 85; *Budd vs. The State*, 3 Hump. 483. *Sword vs. The State*, 102.
 6. The transmission of a sealed letter by mail, containing libellous matter is indictable. The indictment must charge, that it was sent with the intention of provoking a breach of the peace. *Hodges vs. The State*, 112.
 7. The same strictness is not required either as to allegation or proof in prosecutions for misdemeanors as in those for felonies. 2 Hump. 313. *Thompson vs. The State*, 138.
 8. An indictment charged, that two persons with force and arms, &c. "did make an affray by fighting;" It is held, that this charge of fighting was sufficiently certain and definite, and the indictment valid. *The State, vs. Benthall et als.* 519.

INFANT.

1. He who avoids an executed contract on the ground of infancy, must refund the consideration received by him. *Smith vs. Evans*, 70.
2. Minors may maintain an action of trover by their next friend, but he is not entitled to receive the money recovered. It will be ordered to be paid into court, subject to the demand of a legally constituted guardian. *Benton vs. Pope et als.* 392.
3. A decree against an heir, who was a minor, for the sale of lands, for the satisfaction of debts of deceased, is not void on the ground, that the heir was not served personally with process; it is sufficient if he be made a party by the bill and service of process and copy on the regular guardian. *Britain vs. Cowen*, 315.

INNOCENT PURCHASER.

Where a purchase is made under circumstances which should put the vendee on his guard as to title, he is not an innocent purchaser. *Gookin vs. Graham*, 480.

INSOLVENT ESTATES.

See *Mosier vs. Zimmerman*, 62: *Dance vs. McGregor*, 428: *Lamden vs. The State*, 83, No. 3.

INTEREST.

1. A jury may give interest in the name of damages for a breach of contract in failing to deliver personal property. *Noe vs. Hodges*, 103.
2. Where the court charged the jury, that they might give interest or not, as they choose, the judgment should not be reversed, even if the charge were erroneous, unless the jury did give interest. *Ibid.*
3. Where a note was made payable one day after date, and an agreement was subjoined, that suit should not be brought on it, so long as the maker was believed to be solvent, such agreement could not be regarded, either in point of intention or legal effect, as barring the right to interest. *Rollman vs. Baker et als.* 406.

JUDGMENT.

1. A recovery of a judgment against "the defendants," embraces those only who are served with process and who appear and defend the suit. *Boyd vs. Baynham*, 386.
2. A judgment rendered by a justice of the peace is not void because the warrant does not specify before what particular justice of the peace it was returnable. *Jarrell vs. White*, 306.
3. Where the plaintiff procured the levy of an execution which is stayed by writ of error *coram nobis* and *superseas*; it is held, that the plaintiff did not lose his lien, if he proceeded to sell within twelve months after the dismissal of the writ of error and discharge of the *superseas*. *Planters' Bank vs. Union Bank*, 304.
4. Where a joint judgment and joint verdict have been rendered against defendants, and there is no evidence to sustain the verdict as to one, the verdict must be set aside and judgment must be reversed as to both. *Saunders vs. Harris*, 345.

JURY.

When a juror in a criminal case becomes so sick, that it is impossible to proceed with the trial of the case, the court may in its discretion discharge such juror and

83—VOL. V.

JURY—*Continued.*

swear another in his stead, or discharge the whole jury and continue the case till the next term. *The State vs. Curtis*, 601.

JUSTICES OF THE PEACE.

1. A liberal and not a restricted construction will be given to the proceedings of justices of the peace. *Heffly vs. Hall*, 581.
2. Where an execution was ordered against several defendants by a justice of the peace, and the constable levied it on real estate, returning it with an endorsement of no property of the defendant found, the word defendant will be construed to be *nomen collectivum* and to mean defendants. *Ibid.*

LARCENY.

1. Conduct exhibiting satisfactory indications of guilt, is not sufficient to sustain a conviction, unless there be also satisfactory evidence that a crime has been committed; as in cases of alledged larceny, that the property has been feloniously taken and carred away. *Tyner vs. The State*, 383.
2. A mere declaration in evidence that the horse has been stolen, is not sufficient evidence of the *corpus delicti*. The facts must appear so that the judge and jury may see whether those facts in point of law amounted to a felonious taking and carrying away of the property in question. *Ibid.*

LIBEL.

The transmission of a sealed letter by mail, containing libellous matter is indictable. The indictment must charge, that it was sent with the intention of provoking a breach of the peace. *Hodges vs. The State*, 112.

LIEN.

1. Where the consideration was paid by one alone of the joint purchasers of real estate, upon a decree of sale of the interest of the other purchaser at the instance of judgment creditors, it is held, that he who paid the purchase money had a right first to be satisfied out of the proceeds of the sale. *Sweat vs. Henson*, 49.
2. Where the plaintiff procured the levy of an execution which is stayed by writ of error *coram nobis* and super-

LIEN—*Continued.*

- sedes*; it is held, that the plaintiff did not lose his lien, if he proceeded to sell within twelve months after the dismissal of the writ of error and discharge of the *super-sedes*. *Planters' Bank vs. Union Bank*, 304.
3. A vendor asserting his lien for purchase money by sale of the real estate, is not entitled to rent for the land whilst occupied by vendee. *Medley vs. Davis*, 387.
 4. In this case real estate was sold by decree for the payment of the purchase money, and the proceeds did not satisfy the decree. During the pendency of the suit the land was in the possession of the court, and rents were paid over to a receiver. It was held, that such rents should be appropriated to the satisfaction of the decree. *Ibid.*
 5. The assignee of a note given by the vendee of real estate, has a right to enforce the vendor's lien; but this right is not extended to the holder of collateral security for the payment of such note. *Norvell vs. Johnson*, 489.
 6. Where real estate is sold and conveyed, the vendor has a lien on the land for the payment of the purchase money, whilst it remains in the hands of the vendee or his assignee with notice of the lien. *Taylor vs. Hunter & Searcy*, 569.
 7. A court of chancery has no power to restrain the purchaser of real estate from selling it without announcing the existence of a lien. It can do nothing in the premises except order a sale of it in the hands of vendee or assignee with notice, for the satisfaction of the purchase money. *Ibid.*

LIMITATIONS ON ESTATES.

1. A limitation resting on the death of an individual without issue, rests on an indefinite failure of issue, and is void for remoteness whether created by deed or will. *Chester vs. Greer*, 26.
2. To create an estate in fee simple, the land must be conveyed to the purchaser and *his heirs*. Where it is conveyed to the purchaser alone, a life estate alone is created. *Hunter vs. Bryan*, 47.
3. A deed which gave to A a certain slave, to have and hold forever, the same to remain in the possession of B

LIMITATIONS ON ESTATES—*Continued.*

during his life without the right of disposition and without being subject to his creditors, vests the absolute legal title to the slave in A. *Benton vs. Pope*, 392.

4. To constitute a valid executory devise, the contingency upon which it is to take effect must occur within a life or lives in being and twenty-one years and a fraction of a year afterwards. If then it is limited to take effect upon the failure of issue, that failure must be definite, and certain to happen within the period above mentioned; for if the termination be upon an indefinite failure of issue—that is, upon the extinction of the whole line of descendants—it is too remote, as tending to the creation of perpetuities, and is therefore void, and the property vests absolutely in the first taker. *Booker vs. Booker*, 505.
5. The testator provided as follows: "Should any of my children die without issue coming to maturity, or die without issue either before or after coming of age, or should leave issue, which issue should die before coming of age; in either of these events, such portion of my estate so bequeathed to such child or children is to be equally divided between my surviving children." The contingency upon which this limitation is to take effect must happen in the lifetime of some of the testator's children, and it is therefore valid in accordance with the above rule. *Ibid.*
6. Where a will gives an absolute power of disposition and a limitation over is made by way of executory devise, such limitation is void, and the estate vests in the first taker. *Ibid.*

LIMITATION ON SUITS.

1. An equity of redemption is barred by a seven years possession of mortgage, holding adversely with the knowledge of the mortgagor, under a purchase of an outstanding claim. *Wallen vs. Huff*, 91.
2. Where the land of the deceased husband was sold under a void judgment and the possession voluntarily relinquished by the widow, who failed to assert her right to dower by suit for twenty years, it is held, that she had lost her right. *Carmichael vs. Carmichael*, 96.
3. Where a tract of land belonging to tenants in common, has been adversely held for the period fixed by the stat-

LIMITATION ON SUITS—*Continued.*

ute of limitations, and some of these tenants in common have been of age during such adverse possession, and others not, it is held, that the interest of each tenant is barred or otherwise, as he may be within or without the saving of the statute. *Wade vs. Johnson*, 117.

4. Where a portion of a tract of land, owned by tenants in common, had been adversely held, until the right of all, except one, who was a minor during such adverse possession, was barred: It is held, that the assignment by judicial partition, of the part so adversely held, to the minor, would not vest him with the entire interest therein, but only his aliquot share thereof. *Ibid.*
5. The statute of limitation does not run in favor of an express trustee against *cestui que trust*. It is otherwise as to trustees by operation of law. *Haynie vs. Hall*, 290.
6. Where an executor paid over money due legatees to a third person, such person held the money as trustee by operation of law, and the statute of limitations applied. *Ibid.*
7. Where there is a fraudulent concealment of the cause of action, the statute commences running from the time of the discovery of such cause of action; but where the rights of the party depended on recorded documents, there must have been such misrepresentations as prevented the party from investigating his rights. *Ibid.*
8. The mere fact that a father puts his child in possession of a slave, will not give him a title in three years by the statute of limitations. The child is a bailee, and its possession is not adverse. *Turner vs. Grainger*, 347.
9. Where a parol and void gift of a slave is made, the statute commences running from the date of the gift, because the possession is adversely held. *Ibid.*
10. The statute of limitations of three years, protects an endorser: and the statute of six years only protects a surety on the face of a note. Debt lies on the last undertaking and not on the first. *McGuire vs. Blanton*, 361.
11. Distributees may recover slaves illegally sold by the administrator. But the administrator cannot avoid his own sale, and the distributees are, therefore, not affected by his failure to sue within the time prescribed by the statute of limitations. *Herron vs. Marshall*, 443.

LIMITATION ON SUITS—*Continued.*

12. Where defendant obtained possession of land by virtue of a contract with the plaintiff, he cannot hold in hostility to him and claim a right of occupancy in himself. *Knox vs. Thomas*, 573.
13. In an action against a partner of an unincorporated banking association, or against a bank, where such bank or partner relies on the statute of limitations, defendant must show that the note was last issued by the bank or association more than six years before suit brought. *Greer vs. Perkins*, 588.
14. Naked trespassers pleading the statute of limitations cannot connect their possession with the possession of the holders of the legal title, who are sued and do not plead the statute, so as to form the bar of the statute. *Graham vs. Nelson*, 605.
15. After a sale of real estate, and before conveyance of title, the vendor is trustee for the vendee, and whilst his possession can be reasonably presumed to be in accordance with the trust, it will be construed for the benefit of the *cestui que trust*, and the act of limitations will not operate. *Ibid.*
16. Where both parties, claiming title to real estate, were non-residents, the statute of limitations did not begin to run against the right to divest title by bill in chancery till the passage of the act authorizing such bills to be filed where the real estate lies. *Ibid.*
17. Sullivan warranted the title of slaves to Caplinger and died. The slaves were recovered from Caplinger, Sullivan's title being adjudged invalid. It is held, that Caplinger was not a creditor of Vaden, nor his representative within the meaning of the act of 1715, ch. 48, sec. 9, until the recovery of the slaves, and that the statute of limitations began to run from that date. *Caplinger vs. Vaden*, 629.
18. Where a party relies on his possession alone to resist the right of the true owner of land, he must show his actual continued, uninterrupted and adverse possession for the time required by the statute of limitations, 556.

MARRIAGE.

All marriages of a foreign country, consummated in pursuance of the forms and usages of such country, are re-

MARRIAGE—Continued.

cognized as valid by the laws of Tennessee; and therefore a marriage consummated according to the usages of the Cherokee tribe of Indians within that portion of Cherokee country which is within the limits of Tennessee, yet before the extension of the laws of Tennessee over it, was held valid. *Morgan vs. McGhee*, 13.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, to excuse the defendant it must appear that he had probable cause for the prosecution of the plaintiff, or that he acted *bona fide* without malice. *Hall vs. Hawkins*, 357.
2. Probable cause is the existence of such facts and circumstances, as would excite in a reasonable mind, a belief of the guilt of the person suspected. A belief, however, that a given state of facts would constitute the crime, when they did not, would not furnish probable cause. *Ibid.*
3. The want of probable cause, affords a presumption of malice. This, however, may be rebutted by evidence, showing that the party acted in good faith, and in the honest discharge of what he believed to be his duty. *Ibid.*

MASTER AND SERVANT.

The master is liable for injuries done by his servant whilst in his employment arising from negligence, but is not liable for torts: *ex gr.* if an overseer receive a cowhide from his employer, with directions to whip a slave till he be humbled, and the overseer inflicted blows on the slave so negligently and recklessly as to produce his death, the employer would be liable for the value of the slave. It is otherwise where the overseer abandoned the directions of his employer, and maliciously and intentionally killed the slave. *Purveyar vs. Thompson*, 397.

MERCHANT.

To constitute a merchant, in the meaning of the revenue laws, the business of buying and selling should be the pursuit and vocation by which the party makes his living. *State vs. Smith*, 394.

MISDEMEANOR.

1. In a case of misdemeanor where the allegations of the indictment necessarily involve a negative of the words of the statute creating the offence, the indictment is good. See *Peck vs. The State*, 2 Hump. 85; *Budd vs. The State*, 3 Hump. 483. *Sword vs. The State*, 102.
2. See INDICTMENT.

MISTAKE, CLERICAL.

The act of 1801, ch. 6, sec. 64, which makes the obtaining a writ of injunction against a judgment operate as a release of errors at law, does not prohibit the correction of a mistake made by the clerk in entering up the judgment of the court. *Blake vs. Dunn*, 578.

MISTAKE OF LAW AND FACT.

See *Trigg vs. Read*, 529.

MONEY.

1. A judgment is not discharged by payment to a clerk or sheriff of property or evidences of debt or anything but money. A receipt by such officers, of current bank paper is a discharge of the judgment, unless it be objected to before the reception of it. Current convertible bank paper is money. *Crutchfield vs. Robins, Tingley & Co.* 15.
2. An indictment for usury averring a loan of money is supported by evidence of a loan of bank paper. *Graham vs. The State*, 40.
3. Money is a generic term and embraces every description of coin or bank notes recognized by common consent as a representative of value in effecting exchanges of property or payment of debts. *Hopson vs. Fountain*, 140.
4. Technical words, like others, may have their meaning modified or controlled by accompanying words or phraseology. *Ibid.*

MOTION.

See SHERIFF: CONSTABLE: SURETY.

MORTGAGE.

1. If a person having an incumbrance or security upon an estate, suffer the owner to procure additional money up-

MORTGAGE—Continued.

on the estate by lien or mortgage, concealing his incumbrance or security, he shall be postponed to the second incumbrancer. It is otherwise where he denies that he has an incumbrance on the estate without being informed that the second incumbrancer intends to loan money on the faith of the estate; nor will the mortgage be voidable for fraud by false declarations as to the existence of the mortgage, where debts are created on the faith of such declarations without lien taken on the estate for the security of such debt. *Chester vs. Greer*, 26.

2. Complainant claimed a slave which was levied on as the property of a third person. He consented to let the slave be sold on condition that if the defendant purchased him he should have the right to take the slave by paying the money bid by defendant. It is held, that this agreement did not amount to a mortgage. *Bracken vs. Chaffin*, 575.
3. A deed of trust is a mortgage, with a power conferred on the mortgagee or a trustee to sell without resort to a court of chancery for foreclosure. The power of foreclosure still belongs to a court of chancery, if the party chooses not to act on his power to sell. *Bennett vs. Union Bank*, 612.
4. The charter of the Union Bank, authorizing it "to hold land mortgaged to it by way of security," may take a deed of trust on real estate for the security of debts due the bank. *Ibid.*
5. An equity of redemption is barred by a seven years possession of mortgagee, holding adversely with the knowledge of the mortgagor, under a purchase of an outstanding claim. *Wallen vs. Huff*, 91.

MULTIFARIOUSNESS.

1. Where complainants unite in a bill claims which are distinct and hostile to each other, such bill is demurrable for multifariousness. *Tilman vs. Searcy*, 487.
2. See *The Governor vs. McEwen*, 241.

MURDER.

See *Jim vs. The State*, 145.

NEGOTIABLE PAPER.

1. The fact that the second endorser received half of the

NEGOTIABLE PAPER—*Continued.*

- proceeds of a discounted note by previous agreement, is a good defence to that extent in law or equity, for the first against the second endorser. *Galbrath vs. Martin & Findley*, 50.
2. Where the notary made a mistake as to the date of the protest in the notice furnished to the endorser, such mistake may be corrected by proof on trial. *Ross vs. Planters' Bank*, 361.
 3. The fact of the delivery of a notice to an endorser, like other facts, may be inferred by circumstances, and the taking an indemnity after protest, is a circumstance going to sustain such fact, and admissible evidence. *Ibid.*
 4. The statute of limitations of three years, protects an endorser: and the statute of six years only protects a surety on the face of the note. Debt lies on the last undertaking and not on the first. *McGuire vs. Blanton*, 361.
 5. The payee of a note, who endorses it over, is a competent witness to prove in behalf of the maker, that the note was not assigned in due course of trade. *Bailey & Cochran vs. Cooper*, 400.
 6. A notice to an endorser is good, if delivered in due time at his residence, or at his usual place of doing business. *Phillips vs. Alderson*, 403.
 7. A notice given by the holder of a promissory note to the second endorser too late to fix his responsibility to the holder, will not avail the third endorser, though in due time, if given by him to the second. *Simpson vs. Turney*, 419.
 8. Where an endorsed note put in circulation comes to the hands of the maker for value, it is a discharge of the endorsers; not so, where it was endorsed and returned to the maker for his accommodation and by him put into circulation with his endorsement. *Planters' Bank vs. White*, 441.
 9. It is not necessary to the official validity of a notary's certificate that it appear by its date to be made out on the day of notice given. *Union Bank vs. Holcomb*, 583.
 10. A guaranty in these words: "I guaranty the payment of

NEGOTIABLE PAPER—*Continued.*

the within note at the insolvency of the drawers," is a guaranty of the solvency of the drawers, and binds the holder to use reasonable indulgence in the collection of the money. *Graham vs. Bradley*, 476.

11. What facts constitute reasonable indulgence is a question of law to be decided by the court. *Ibid.*
12. Where two months and a half elapsed between the time the note fell due and the commencement of court and no suit was instituted at the term, it was held that due diligence was not used by the holder, and guarantor was discharged. *Ibid.*

NEW TRIAL.

1. Where justice has been done in the trial below, and the court see from the record of the suit that a second trial would inevitably end in the same result, the court will not grant a new trial, though the circuit judge may have improperly assumed the existence of facts in his charge to the jury. *Graham vs. Bradley*, 476.
2. The supreme court will not grant a new trial in criminal cases on a mere doubt, such as would justify a jury in rendering a verdict of not guilty: Yet where the evidence is not sufficient to warrant the verdict, the court will grant a new trial, although rashness does not appear. *Bedford vs. The State*, 552.
3. When a misdemeanor has been positively proved against an individual, the court should be slow in granting a new trial, to let in the defence of *alibi*, as it is subject to great abuse. *Thompson vs. The State*, 138.

NOTARY.

1. It is not necessary to the official validity of a notary's certificate that it appear by its date to be made out on the day of notice given. *Union Bank vs. Holcomb*, 583.
2. See NEGOTIABLE PAPER.

NOTICE.

See NEGOTIABLE PAPER: SHERIFFS SALE.

NUISANCE.

The continued and uninterrupted use, by the public for twenty years, of a stream for purposes of navigation,

NUISANCE—*Continued.*

constitutes it a public thoroughfare, and the obstruction of it a nuisance, which any one may abate. *Stump vs. McNairy*, 363.

OCCUPANCY.

1. The fact that a settler in the Ocoee District had secured an occupancy under the act of 1837, ch. 11, did not prevent him from securing another, under the act of 1839, ch. 8. *Davis & Wiggins vs. Williams*, 42.
2. The act of 1837, ch. 2, does not confer a right of preference of entry on a possession of land in the Ocoee District by agent or servant. The land must be the residence and domicil of the party claiming the right. *Kennedy vs. Wiggins*, 125.
3. Wiggins took possession of land in the Ocoee District by his agent, Pike, who was residing on the land at the time of the passage of the act authorizing occupant preferences. Pike sold his right. Held, that his assignee was entitled to the land, there existing no legal obligation between Pike and Wiggins on the ground of tenancy, and Pike being the actual resident. *Ibid.*
4. Persons entitled by law to make extension entries under the act of 1840, ch. 62, have preference over general enterers, for the term of four years from the opening of the land office, by virtue of the act of 1842, ch. 34. *Patterson vs. McCutchen*, 322.
5. Upon the passage of the act of Congress relinquishing to the State of Tennessee the title to the unappropriated lands in the Western District of Tennessee, the occupant laws previously enacted vested those who had complied with such laws rights which constitute a valid consideration for a contract. *Knox vs. Thomas*, 573.
6. Where defendant obtained possession of land by virtue of a contract with the plaintiff, he cannot hold in hostility to him and claim a right of occupancy in himself. *Ibid.*

PARTNERS.

1. The power to sign the firm name, by endorsement, for accommodation purposes, would not authorize the signature of the firm name in the face of the note as an unconditional and direct surety. *McGuire vs. Bluntom*, 361.

PARTNERS—*Continued.*

2. If money be borrowed by a partner in his own name and on his own credit, and his individual note be given therefor, it is no fraud afterwards to execute the note of the firm in renewal, provided the money goes into the business of the firm. *Union Bank vs. Eaton*, 499.
3. If a partner borrow money for the firm, and on its credit, it is no fraud to substitute the note of the firm for the individual bill of the partner given to secure its payment, though it may not appear that the money was applied to the business of the firm. *Ibid.*
4. A firm has the power to bind itself to pay the debts of another, and to secure the payment of such debt by the execution of a deed of mortgage or by other means. *Allen, Asher & Co. vs. Morgan*, 624.
5. A firm has the right to secure its liabilities for others, in preference to its individual creditors. *Ibid.*

PAROL.

See EVIDENCE.

PERJURY.

1. The forms of judicial proceedings both in civil and criminal cases are established by the courts of justice, and must from time to time be so modified, changed and applied as to subserve the ends of justice, and the safety of the citizen. *Lamden vs. The State*, 83.
2. A bill of indictment for perjury, framed upon a false oath taken in proceedings in chancery, need not set forth at large the bill in chancery and other proceedings connected therewith. It is only necessary to set forth by description and averment so much of the proceedings as will make manifest the materiality of the oath taken. *Ibid.*
3. No perjury can be assigned on an extra judicial oath; and, therefore, where a Clerk and Master, directed to take an account of the indebtedness of an insolvent estate, summoned at the instance of complainant a creditor, and such creditor swore falsely, that no money had been paid on a note held by him against the estate, it is held, that no perjury was committed. *Ibid.*
4. An oath that certain notes were due and unpaid, and that deponent had received nothing in payment thereof, does not negative the existence and justice of a set-off. *Ibid.*

PLEADINGS AT LAW.

1. Where an allegation is necessary in a declaration to maintain an action, its omission in the declaration cannot be supplied by the proof. *Pollard vs. Thomason*, 56.
2. A judgment by default; when an admission of assets, 62.
3. The issuance of process in a civil suit on Sunday without a compliance with the statutory provisions authorizing it, is matter in abatement of the process. *Helm vs. Rodger*, 105.
4. Where pleas in short are filed, if the defendants choose to treat them as valid, the court will so regard them. *Carr vs. Stevenson*, 559.
5. Where the verdict responds to one only of the pleas, it will be set aside. *Ibid.*

PLEADINGS AND EVIDENCE IN CHANCERY.

1. An answer is evidence against the party making it without the production of the bill, if the answer be not responsive to the bill, but sets up new matter in defence. *Wallen vs. Huff*, 91.
2. A garnishing creditor will not be permitted to take from the hands of another creditor to whom assets have been transferred by their debtor for his debt or indemnity; and the court will determine upon the amount of indebtedness existing at the time of the decree, and will not confine itself by the allegation of the answer to indebtedness existing at the time of the answer made. *Nolen vs. Crook*, 312.
3. The bill charged, that an alleged deed, on which the defendant rested his defence, had no valid existence. The answer averred the existence and validity of the deed. Held, that this state of pleadings did not dispense with the necessity of defendant's proving affirmatively the existence and validity of such deed. *Sims vs. Sims*, 370.
4. An allegation in an answer, which is not responsive to the bill, is not evidence for the defendant, and the *onus probandi* is on the defendant to establish it. *Davis & Richardson vs. Clayton*, 446.
5. An attachment bill charged, that defendant held a note given by Black & Morton to Wills, the judgment debtor. Defendant answered, that he had the note, but that

PLEADINGS AND EVIDENCE IN CHANCERY—*Continued.*

the title to the note was in him by prior assignment. Held, that this allegation of ownership was not responsive to the bill, and not evidence for the defendant. *Ibid.*

6. Where an attachment bill charged one of the defendants with being the depositary of a promissory note, the allegations in the answer of such defendant, as to the title to said note, would not be evidence for a co-defendant. *Ibid.*
7. Where complainants unite in a bill claims which are distinct and hostile to each other, such bill is demurrable for multifariousness. *Tilman vs. Searcy*, 487.
8. Pleas in bar in chancery, based on matters *in pais*, must be verified by the oath of the defendant. *Graham vs. Nelson*, 605.
9. The answer of defendant without objection to the jurisdiction of the court, does not waive the objection in cases where the question involved belong exclusively to courts of law. *McGuire vs. Caruthers*, 414.
10. An objection by a defendant in Chancery, to the testimony of a co-defendant, may be waived, by the mode of his cross-examination of such defendant. *Bailey & Cochran vs. Cooper et als.* 400.
11. A decree of a chancery court having jurisdiction, vesting the legal title of real estate in a person is valid, till reversed or set aside on a proceeding instituted for that purpose, and the validity of such decree cannot be questioned in a collateral proceeding, on the ground that the evidence did not justify the decree. *Thacker vs. Chambers*, 313.

POOR PERSONS.

1. A defendant in an action of forcible entry and detainer cannot dispense with the necessity of giving bond and security for rent, as required by the act of 1842, ch. 186, by taking the pauper's oath. *Norton vs. Whitesides*, 381.
2. In an action for the sale of a horse contrary to the provisions of the act of 1833, ch. 80, the declaration must aver that the plaintiff is the head of a family. *Pollard vs. Thomason*, 56.

PROBATE.

See **ACKNOWLEDGMENT.**

PROCESS.

The issuance of process in a civil suit on Sunday without a compliance with the statutory provisions authorizing it, is matter in abatement of the process. *Helm vs. Rodgers*, 105.

PROSECUTOR.

The prosecutor is no party to the cause, and is not liable in any case for costs, unless it be so directed by statute. *Hansard vs. The State*, 115.

POSSESSION.

See **LIMITATION ON SUITS.**

POSSESSION, WRIT OF.

A Court of Chancery has jurisdiction to award a writ of possession for land where a controversy about the title has been properly brought into the court. *Irvine vs. McRee*, 554.

RAPE.

An indictment against a slave for a rape on a free white woman need not alledge the ownership of such slave: if alledged and disproved, the variance is not fatal. *Peter vs. The State*, 436.

RECEIVING STOLEN GOODS.

An indictment for receiving stolen goods must charge the defendant with receiving them with intent to deprive the true owner thereof. *Hurell vs. The State*, 68.

RECOUPMENT.

Recoupment of damages is allowed the defendant in cases where the plaintiff who has only partially performed his portion of the contract comes into court asking compensation for such partial performance. *Crouch vs. Miller*, 586.

REDEMPTION.

1. An equity of redemption is barred by a seven years possession of mortgagee, holding adversely with the knowledge of the mortgagor, under a purchase of an outstanding claim. *Wallen vs. Huff*, 91.

REDEMPTION—*Continued.*

2. A decree of bankruptcy against a debtor, vests his equities of redemption in the assignee, and no right of redemption arises from a deposit of money by a creditor in the hands of the clerk, or a tender to the debtor, after such decree. *Pillow vs. Langtree*, 389.
3. In ascertaining the time at which the right of redemption allowed by the act of 1820, ch. 11, expires, the day of the sale must be excluded, as the law favors that construction which saves the estate, and prevents a forfeiture of right. *Jones vs. Planters' Bank*, 619.
4. Where an execution debtor redeemed his land from the purchaser, the legal right so redeemed inured to the benefit of vendee to whom he had sold the land after the lien of judgment and before sale. *Ibid.*
5. Where an execution debtor tendered the redemption money, a bill may be filed by a vendee from such debtor, without making such debtor a party. *Ibid.*

REGISTRATION.

1. A deed may be registered by the vendee without the knowledge or consent of the vendor, either during the life of vendor or after his death; and when registered it operates as a conveyance of the legal title *as against vendor* from the date of the deed. *Chester vs. Greer*, 26.
2. Where vendee registered his deed for land after the death of the vendor, and not before, it is held that the vendor did not die seized and possessed of the land, and that his widow was not dowable of such land. *Ibid.*
3. The failure to register a deed makes it void, as to creditors, by statute. No one, however, can be regarded as a creditor till he has established his claim by a judgment, and no deed can be questioned for want of registration or for fraud but by a judgment creditor. *Ibid.*
4. Copies of deeds from the registry books of States where no probate was necessary before registration, are not admissible evidence of the validity of such deeds. *Saunders vs. Harris*, 344.
5. When a deed is acknowledged, its execution is acknowledged on the day it bears date, and a registered copy

REGISTRATION—*Continued.*

- of such a deed is *prima facie* evidence of its execution on such day. *Owen vs. Owen*, 352.
6. The non-registration of a deed for a slave, would render such deed void as against the creditors of the bargainors, but it is nevertheless valid as between the parties, and all other persons than such creditors. *Baldwin vs. Baldwin*, 2 Hump. 437. *Ibid.*
 7. A deed conveying a slave to the wife, by a husband or other person, is a deed for personal estate, which by the act of 1831, ch. 90, is required to be registered in the county where the person executing it lived at the time of its execution. *Ibid.*
 8. The statutes of probates and registration in Alabama are designed to protect purchasers and creditors in Alabama: not in other States. *Gookin vs. Graham*, 480.

REMAINDER.

See PARTITION: LIMITATION ON ESTATES.

RETAILING LIQUORS.

1. Where spirituous liquor is sold by agent contrary to the statute, both principal and agent are guilty and liable to indictment. 2 Hump. 399. *Thompson vs. The State*, 138.
2. The same strictness is not required either as to allegation or proof in prosecutions for misdemeanors as in those for felonies. 2 Hump. 313. *Ibid.*

RIOT.

An indictment charged, that two persons with force and arms, &c. "did make an affray by fighting:" It is held, that this charge of a fighting was sufficiently certain and definite, and the indictment valid. *The State vs. Ben-thal*, 519.

RETURN.

Where an execution was ordered against several defendants by a justice of the peace, and the constable levied it on real estate, returning it with an endorsement of no property of the defendant found, the word defendant will be construed to be *nomen collectivum* and to mean defendants. *Heffly vs. Hall*.

REVENUE LAWS.

See *The State vs. Smith*, 394.

REVERSAL.

See CHARGE OF THE COURT.

REVERSION.

See LIMITATION ON ESTATES.

REVIEW.

Leave to file a bill of review should be obtained by motion in open court. But where the bill was filed by order made at chambers and a general demurrer filed thereto, this objection is waived, and the court will proceed to determine on the validity of the decree sought to be reversed. *Dance vs. McGregor*, 428.

SALE.

See EXECUTION SALE: CHANCERY SALE: WARRANTY.

SCIRE FACIAS.

See COSTS.

SCHOOL FUNDS.

1. A bill was filed in the name of the Governor of the State and the Commissioners of Common Schools against the Superintendent of Public Instruction, and against two sets of sureties, for different periods, for an account of the sums of money received by such functionary during his administration of the common school fund. It is held,
1st. That a court of chancery was the more appropriate forum for the settlement of the various and complicated transactions involved, and adjusting the respective liabilities of the two sets of sureties. And 2d. That the bill was not multifarious. *The Governor vs. McEwen*, 241.
2. The Superintendent of Public Instruction and his subordinate agents are bound to collect the moneys due the Common School Commissioners, in such funds, and such only, as are receivable by the State through its agents in discharge of taxes. *Ibid.*
3. Where funds current at the time and place of the reception of them, became in a reasonable time thereafter uncurrent, by unforeseen events, in the hands of the Super-

SCHOOL FUNDS—Continued.

intendent or subordinate agents, the loss to the extent of its diminished value shall not fall on them, if it appear, that at the time and under the circumstances, the reception of the funds was prudent and proper, and for the probable benefit of the State. *Ibid.*

4. A public collector shall be held responsible if he fails by negligence to collect sums of money which, by the use of reasonable diligence, he might have collected. *Ibid.*
5. When a public functionary uses public money for his own private purposes, he is chargeable with compound interest. *Ibid.*
6. The Legislature of the State, in the absence of constitutional prohibition, has the supreme and unrestricted control over the property and money of the State, and when they, or either of them, are in the hands of a citizen, it has the power to dismiss or compromise suits instituted for the recovery thereof according to its own sense of the interest of the State and right to the citizen, and this power may be delegated. *Ibid.*
7. A resolution of the legislature, appointing commissioners to settle and compromise a suit against the sureties of the Superintendent of Public Instruction, "upon principles of right and justice towards the sureties, and to the best interest of the school fund," and directing that the report of said commissioners should be made the judgment of the court in which the suit was pending, is not in violation of the 10th section of the 11th article of the Constitution of the State. *Ibid.*
8. The board of commissioners of school funds have the power to make all contracts in reference to the school fund, not prohibited by law, and may compromise a doubtful claim for the better security of the fund, yet it being a public corporation, subject to legislative modification or total repeal, the vesting it with such power, does not deprive the legislature of a similar power, when it may choose to exert it by act or resolution. *Ibid.*

SHERIFF.

1. See CONSTABLE: EXECUTION SALE.
2. A judgment is not discharged by payment to a Clerk or sheriff of property or evidences of debt or anything but

SHERIFF—*Continued.*

- money. A receipt by such officers, of current bank paper is a discharge of the judgment, unless it be objected to before the reception of it. Current convertible bank paper is money. *Crutchfield vs. Robin, Tingley & Co.* 16.
3. The plea of covenants performed, admits the due execution and acknowledgment of a sheriff's bond in accordance with statutory provisions *Governor vs. Organ*, 161.
 4. The principles of the case of *Bryan and others vs. Glass' sureties*, (2 Hum. 390,) recognized and approved. *Ibid.*
 5. A sheriff's bond for the collection and payment of State taxes is valid, whether taken for one or two years. *Government vs. Porter*, 165.
 6. A failure to return an execution renders the officer liable for the whole amount of the execution, and the insolvency of the defendant in the execution is no defence. *Webb vs. Armstrong*, 379.
 7. A writ of *venditioni exponas* is an execution within the meaning of the statutes authorizing motions against sheriffs and constables for failure to return executions. *Ibid.*
 8. The act of 1803, ch. 18, sec. 1, authorizing judgment "on motion of the party aggrieved" against any sheriff or other officer who shall fail to return an execution on or before the second day of the term, authorizes judgment by motion against such officer for the failure to return executions in State cases. *Hand vs. The State*, 515.
 9. The act of 1835, ch. 19, authorizes a judgment by motion against a sheriff for a false return of a *fi. fa.* issued in a State case. *Hand vs. The State*, 519.
 10. A judgment against a tax collector need not recite, that it appeared to the court, that the tax list came to the hands of such collector. *Hardaway vs. Chairman*, 557.
 11. A sheriff is not bound to execute void process—he is bound to execute process merely irregular and voidable, and if he fail to do so, he is liable to the plaintiff, and if he execute it, he is protected. *Stevenson vs. McLean*, 332.

SHERIFF SALE.

Notice of the sale of real estate, of which the execution debtor is not in possession, need not be given under the act of 1799. *Farquhar vs. Toney*, 502.

SLAVES.

The mere fact of harboring and concealing a slave, with a view to deprive the true owner of him, does not constitute a felony by the act of 1835, ch. 58: such slave must have been also persuaded to leave the owner. *The State vs. Curtis*, 601.

SPECIFIC ARTICLES.

See TENDER.

SPECIFIC EXECUTION.

See *Trigg vs. Read*, 550.

SUMMARY PROCEEDINGS.

See CONSTABLE: SHERIFF.

SUNDAY.

See PROCESS.

SURETY.

1. Though a surety has a right to bring his principal and the creditor into a court of chancery to compel the payment of the debt, yet before loss incurred or payment made, he has no right to come into a court of chancery to set aside a fraudulent conveyance on the ground of apprehended loss. See 3 Hump. 543: 1 Story Eq. sec. 327. *Williams vs. Tipton*, 66.
2. An order to the sheriff, made by an execution creditor at the instance of a surety, to suspend proceedings on *fi. fa.* and a return of *fi. fa.* endorsed "stayed by order of plaintiff," will not discharge the surety. *Miller vs. Porter*, 294.
3. Where authority is given to the payees of a bill single to affix the name of an individual to such instrument as a surety, *if such payees desired a surety*, the payees could signify their acceptance of him as a surety in no way than by the execution of the power, which must be done in a reasonable time. *Gilman vs. Kibler*, 19.
4. See DELIVERY.

SURETY—*Continued.*

5. A contract for usurious interest is utterly void, and, therefore, a stipulation for delay, based on such consideration, is not obligatory, and though made without the knowledge of the surety, did not discharge him. *Wilson vs. Langford*, 320.
6. See POOR PERSONS.
7. A judgment by motion against a constable before a justice of the peace, was as follows; "It is considered by the court, that Willis Burt recover a judgment against James Davidson and John Adkins and S. H. Lokey his sureties, the said sum," &c. Held, that this did not sufficiently aver the suretyship of the defendants Adkins and Lokey. *Burt vs. Davidson*, 435.
8. The beneficiary in a guardian bond gave an order to a third person on the guardian, which was accepted. This did not discharge the sureties. It did not affect the nature of the debt. It only directed the payment to another person. *Bond vs. Ray*, 492.
9. Any act by the principal, injurious to the rights of the sureties, any failure to do acts required of him by law, discharges the sureties. *Ibid.*
10. Where the beneficiary in the bond, left an accepted order in the hands of a guardian, which he exhibited to the sureties, and informed them that his bond was discharged, such conduct did not discharge the sureties, unless the beneficiary participated in the fraud of the guardian. *Ibid.*
11. Where the beneficiary in a guardian bond, told the sureties they were discharged: It is held, that such declaration discharged them as it may have prevented them from taking an indemnity. *Ibid.*
12. A firm has the power to bind itself to pay the debts of another, and to secure the payment of such debt by the execution of a deed of mortgage or by other means. *Allen, Asher & Co. vs. Morgan*, 624.
13. A firm has the right to secure its liabilities for others, in preference to its individual creditors. *Ibid.*

SURETY OF EXECUTORS AND ADMINISTRATORS.

See *Hughlett vs. Hughlett*, 453.

TAXES.

See MERCHANT.

TAX COLLECTOR.

A judgment against a tax collector need not recite, that it appeared to the court, that the tax list came to the hands of such collector. *Hardaway vs. Chairman*, 557.

TAX FEE.

Where defendants were indicted jointly, jointly tried, and a joint judgment rendered against them for riot; it is held, that the Attorney General is entitled to but one tax fee. *Carroway vs. The State*, 523.

TECHNICAL WORDS.

1. When a word used in the statute has a fixed technical meaning, the legislature must be understood as employing it in that sense, unless there be something in the context, which shows it was intended to be used in a different sense. *State vs. Smith*, 394.
2. Technical words, like others, may have their meaning modified or controlled by accompanying words or phraseology. *Hopson vs. Fountain*, 140.

TENANTS IN COMMON.

See LIMITATION ON SUITS: PARTITION.

TENDER.

Where a note is made payable in property at a given day, the tender must be made in *good faith* and in pursuance of the terms of the contract. Any substantial variation from the terms of the contract, will subject the payor to the payment of the money. *Orr vs. Williams*, 423.

TIME.

1. In the legal computation of time there are no fractions of a day, and therefore the day on which an event happens, or an act is done, must entirely be included or excluded. *Jones vs. Planters' Bank* 619.
2. Whether the day on which an act is done, or an event happens, is to be included or excluded is not determined by any general rule, but depends upon the subject matter to be acted upon. *Ibid.*

TIME—*Continued.*

3. In ascertaining the time at which the right of redemption allowed by the act of 1820, ch. 11, expires, the day of the sale must be excluded, as the law favors that construction which saves the estate, and prevents a forfeiture of right. *Ibid.*

TRUST.

1. See EMANCIPATION: HUSBAND AND WIFE: FRAUD.
2. A deed of trust is a mortgage, with a power conferred on the mortgagee or trustee to sell without resort to a court of chancery for foreclosure. The power of foreclosure still belongs to a court of chancery, if the party chooses not to act on his power to sell. *Bennett vs. Union Bank*, 612.

USURY.

1. A contract for usurious interest is utterly void, and, therefore, a stipulation for delay, based on such consideration, is not obligatory, and though made without the knowledge of the surety, did not discharge him. *Wilson vs. Langford*, 320.
2. Where goods or choses in action are furnished to the buyer at a price greatly above their value; to enable him, by selling them at their real value, to raise money, such transaction is held to be usurious. *Swanson vs. White*, 373.
3. Usury is an illegal and corrupt agreement, whereby more than six per cent. is taken for the loan of money, or the forbearance of debt. *Turney vs. State Bank*, 407.
4. The exchange of bank notes under par, for specie or Eastern funds commanding a premium, is usurious, if the object and intent of the parties to the exchange be to cover a loan of money at more than six per cent.: otherwise it is not. *Ibid.*
5. A replication to a plea of usury, by the act of 1835, ch. 50, must deny the existence of usury altogether in the transaction, or it must state specially the contract. *Richmond vs. Wagnon*, 571.
6. See SUPERSEDEAS.

VARIANCE.

See RAPE: AWARD: USURY.
86—VOL. V.

VENDITIONI EXPONAS.

A writ of *venditioni exponas* is an execution within the meaning of the statute authorizing motions against sheriffs and constables for failure to return executions. *Webb vs. Armstrong*, 379.

VENDOR AND VENDEE.

1. Where the consideration was paid by one alone of the joint purchasers of real estate, upon a decree of sale of the interest of the other purchaser at the instance of judgment creditors, it is held, that he who paid the purchase money had a right first to be satisfied out of the proceeds of the sale. *Sweat vs. Henson*, 49.
2. A purchase of property by a *cestui que trust* at a sale made by the trustee is illegal and voidable at the instance of judgment creditors. *Chester vs. Greer*, 26.
3. If a person having an incumbrance or security upon an estate, suffer the owner to procure additional money upon the estate by lien or mortgage, concealing his incumbrance or security, he shall be postponed to the second incumbrancer. It is otherwise where he denies that he has an incumbrance on the estate without being informed that the second incumbrancer intends to loan money on the faith of the estate; nor will the mortgage be voidable for fraud by false declarations as to the existence of the mortgage, where debts are created on the faith of such declarations without lien taken on the estate for the security of such debt. *Ibid.*
4. A vendor asserting his lien for purchase money by sale of the real estate, is not entitled to rent for the land whilst occupied by vendee. *Medley vs. Davis*, 387.
5. In this case real estate was sold by decree for the payment of the purchase money, and the proceeds did not satisfy the decree. During the pendency of the suit the land was in the possession of the court, and rents were paid over to a receiver. It was held, that such rents should be appropriated to the satisfaction of the decree. *Ibid.*
6. The general rule of law touching the validity of contracts made under mistake is, those made under a mistake as to facts are not obligatory. *Trigg vs. Read*, 529.
7. The general rule touching the invalidity of contracts made under a mistake of facts is thus qualified: The

VENDOR AND VENDEE—*Continued.*

facts about which there has been a mistake must be of a material nature and such as the party injured could not have by reasonable diligence acquired the knowledge of when put on enquiry. *Ibid.*

8. Where the vendor procured the rescission of a contract for the sale of real estate by withholding from the vendee information of the validity of his title, this is declared direct fraud and the contract of rescission declared void. *Ibid.*
9. Where a compromise of controverted rights is entered into, if both parties are in equal ignorance of the true state of those rights, such compromise is valid; and this whether the doubt rests upon a matter of fact or of law. *Ibid.*
10. If an executory contract has been obtained upon an inadequate consideration, or if it has been made by defendant in ignorance of his rights either as to law or fact, such contract will not be enforced specifically by a court of chancery. *Ibid.*
11. Where real estate is sold and conveyed, the vendor has a lien on the land for the payment of the purchase money, whilst it remains in the hands of the vendee or his assignee with notice of the lien. *Taylor vs. Hunter & Searcy*, 569.
12. A court of chancery has no power to restrain the purchaser of real estate from selling it without announcing the existence of the lien. It can do nothing in the premises except order a sale of it in the hands of vendee or assignee with notice, for the satisfaction of the purchase money. *Ibid.*
13. The assignee of a note given by the vendee of real estate, has a right to enforce the vendor's lien; but this right is not extended to the holder of a collateral security for the payment of such note. *Norvell vs. Johnson*, 489.
14. See WARRANTY: LIEN.

VERDICT.

1. Where the verdict responds to one only of the pleas filed, it will be set aside. *Carr vs. Stevenson*, 559.
2. Where the language of the verdict is ambiguous, it is

VERDICT—Continued.

the duty of the court to give it such construction as will make it effective; *ut res magis valeat quam pereat*. *Ibid.*

3. Where a jury, under the act of 1815, ch. 53, returned a verdict in favor of the defendant for the sum of \$17, without making any response to the claim of the plaintiff, and thereupon the defendant came in and released the verdict for the said sum: It was held, that there was nothing upon which the court could render judgment, and that a *venire de novo* should be awarded. *Barnard vs. Young*, 100.
4. The court has no power to amend the verdict of a jury. *Ibid.*

WAGER.

In order to constitute a wager, there must be a risk by both parties. *Quarles vs. The State*, 561.

WARRANT.

See **JUDGMENT**.

WARRANTY.

1. In the sale of real estate without warranty of title, the vendee only acquires such title as the vender possesses, and subsequently acquired title does not inure to the benefit of the vendee: *secus*, where there is a warranty. *Gookin vs. Graham*, 480.
2. In a sale of personal property there is always an implied warranty of title, unless the purchase is made under such circumstances as clearly show that the vendee intended to risk the title. *Ibid.*
3. A warranty of title is implied in the sale of a chattel. *Charlton vs. Lay*, 496.
4. In the sale of chattels, a warranty of title is raised by implication of law, and this implication is not excluded where the sale is by deed without warranty. *Trigg vs. Faris*, 343.

WEIGHTS, FALSE.

An indictment for selling by false weights must specify the person to whom the sale was made. It is not sufficient to charge, that defendant sold to "divers persons." *The State vs. Woodson*, 55.

WILL.

See DEVISE: LIMITATION ON ESTATES.

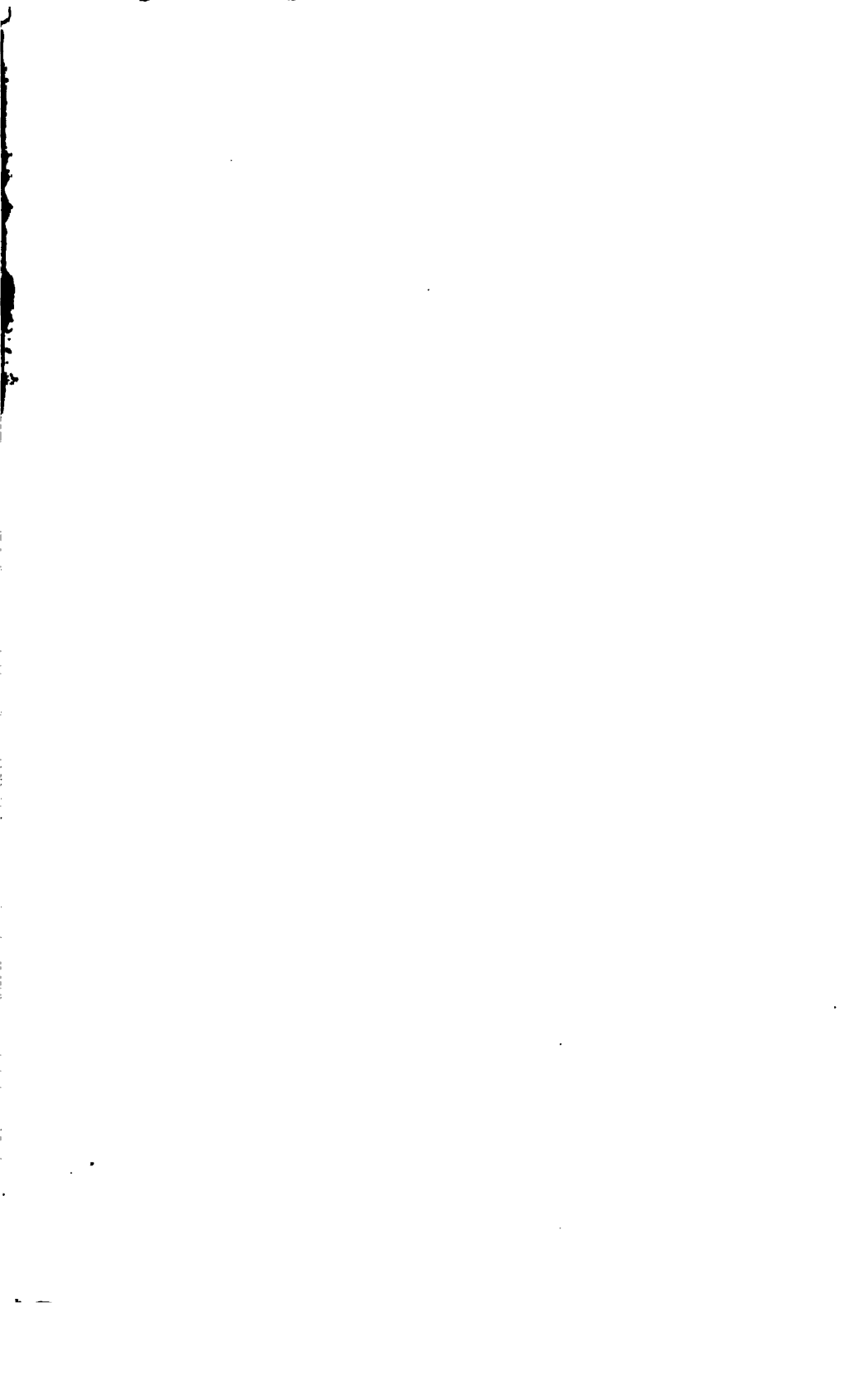
WITNESSES.

1. If objection be not made to an incompetent witness when presented in the circuit court, the objection is waived. *Davis vs. Roberts*, 111.
2. A widow is not a competent witness in a suit by the heir for a portion of the real estate of her deceased husband, where a recovery by the heir would increase her dower interest, or a loss reduce it. *Wade vs. Johnson*, 117.
3. The payee of a note, who endorses it over, is a competent witness to prove in behalf of the maker, that the note was not assigned in due course of trade. *Bailey & Cochran vs. Cooper*, 400.
4. An objection by a defendant in chancery, to the testimony of a co-defendant, may be waived, by the mode of his cross-examination of such defendant. *Ibid.*
5. It is competent to discredit a witness, by proving that he was drunk at the time the transaction he attempts to relate took place. The large quantity of liquor drank is a circumstance tending to prove drunkenness, and as such, is competent evidence to prove the fact. *Fleming vs. The State*, 565.
6. The credibility of a witness is a question of fact to be decided by a jury; not by the number who may testify for or against his credibility, but by their respectability, intelligence, consistency and means of information. *Norris vs. State*, 3 Hump. 395. *Kinchelow vs. The State*, 9.

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